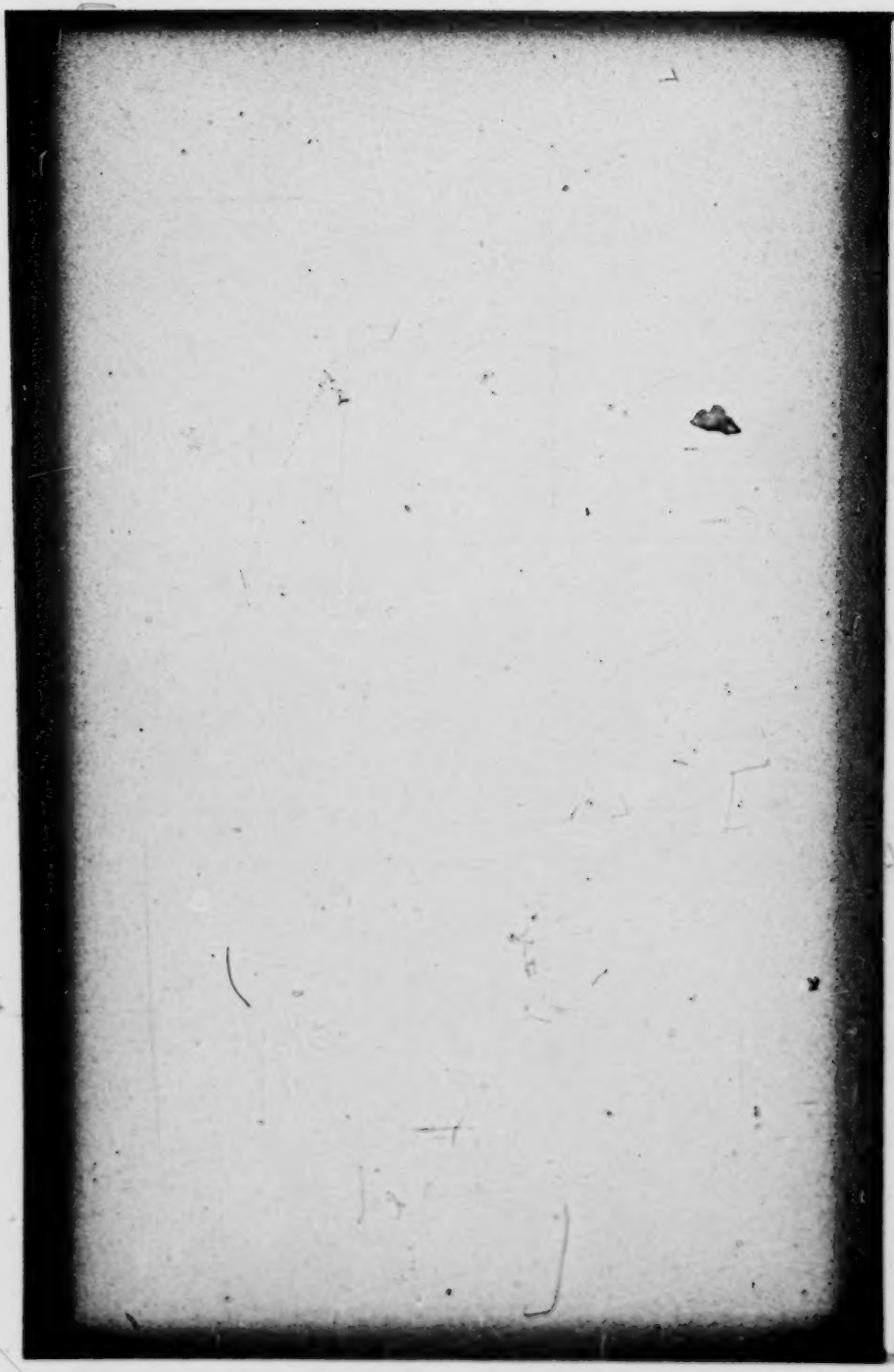

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, Jr., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE THIRD CIRCUIT

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Marvin D. Perskie and
Norman L. Zlotnick,
Attorneys for Petitioner,
3311 New Jersey Avenue,
Wildwood, New Jersey 08260

Patrick T. McGahn, Jr.,
Co-Counsel for Petitioner,
1421 Atlantic Avenue,
Atlantic City, New Jersey 08401

GEORGE B. NEIDIG, JR.
Of Counsel and on the Petition

N. J. Appellate Printing Co., Inc., Woodbridge, N. J. (201) 636-2030

TABLE OF CONTENTS

Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit 1

Opinions Below 2

Jurisdiction 3

Questions Presented 4

Counter-Statement of the Case 5

Reasons for Granting the Writ 16

Introduction 16

The "extraordinary circumstances" doctrine 17

The application of the "extraordinary circumstances" exception to the facts of the present case 21

The irreparable injury requirement 26

The bad faith requirement 37

The effect of Mitchum v. Foster, 407 U.S. 225 (1972) upon Younger v. Harris, 401 U.S. 37 (1971) 42

Concluding statement 45

Conclusion 49

CASES CITED:

Allee v. Medrano,
— U.S. —, 94 S. Ct. 2191 (1974)
(Burger, Ch. J. concurring) 16, 20

American Trial Lawyers Ass'n. New Jersey Branch v. New Jersey Supreme Court,
409 U.S. 467 (1973) 36

TABLE OF CONTENTS

CASES CITED:

Baxter v. Birkins,
314 F. Supp. 222 (D. Colo. 1970) 37

Bell v. Hood,
327 U.S. 678 (1946) 18

Bennett v. Gravelle,
320 F. Supp. 203 (D. Md. 1971) 36

Blackmer v. United States,
284 U.S. 421 (1932) 35

Boyle v. Landry,
401 U.S. 77 43

Branzburg v. Hayes,
408 U.S. 664 (1972) 35

Brotherhood of Locomotive Firemen &
Enginemen v. Bangor and Aroostook R.R.,
389 U.S. 327 (1969) 40

Bryson v. United States,
396 U.S. 64 (1969) 34

Buchalter v. New York,
319 U.S. 427 (1943) 27

Byrne v. Karalexis,
401 U.S. 216 43

City of Lawrence v. Civil Aeronautics Bd.,
343 F.2d 583 (1st Cir. 1965) 26

Coleman v. Alabama,
399 U.S. 1 (1970) 28

Conley v. Dauer,
463 F.2d 63 (3rd Cir. 1972) 28

TABLE OF CONTENTS

CASES CITED:

Conover v. Montemuro,
477 F.2d 1073 (3rd Cir. 1973) 26

Columbe v. Connecticut,
367 U.S. 568 (1961) 28

DeVita v. Sills,
422 F.2d 1172 (3rd Cir. 1970) 23, 26

Dombrowski v. Pfister,
380 U.S. 479 (1965) 38, 45

Duncan v. Perez,
445 F.2d 557 (5th Cir. 1971) 39

Dyson v. Stein,
401 U.S. 200 43

England v. Louisiana State Bd. of Medical Examiners,
375 U.S. 411 (1964) 36

Fenner v. Boykin,
271 U.S. 240 (1926) 25

Garrity v. New Jersey,
385 U.S. 493 (1967) 28

Glickstein v. United States,
222 U.S. 139 (1952) 31

Grosso v. United States,
390 U.S. 62 (1968) 34

Hackett v. McGuire Bros.,
445 F.2d 422 (3rd Cir. 1971) 5, 17

Haynes v. United States,
390 U.S. 85 (1968) 34

TABLE OF CONTENTS

CASES CITED:

Helfant v. Kugler,
484 F.2d 1277 (3rd Cir. 1973) 2

Hobbs v. Thompson,
448 F.2d 456 (5th Cir. 1971) 21

Jackson v. Denno,
378 U.S. 368 (1969) 28

James v. New Jersey,
56 N.J. Super. 213 (App. Div. 1959) 47

Jeck, In re,
26 N.J. Super. 514, 98 A.2d 319
(App. Div. 1953) 35

Johnson v. Avery,
393 U.S. 483 (1969) 28

Lake Carriers Ass'n. v. MacMullan,
406 U.S. 498 (1972) 20, 36

Leslie v. Matzkin,
450 F.2d 310 (2nd Cir. 1971) 19

Lewis v. Kugler,
446 F.2d 1343 (3rd Cir. 1971) 21, 38-39

Littleton v. Berbling,
468 F.2d 309 (7th Cir. 1972) 5, 17

Malloy v. Hogan,
378 U.S. 1 (1964) 28

Marchetti v. United States,
390 U.S. 39 (1968) 34

Maryland Casualty Co. v. Pacific Coal & Oil Co.,
312 U.S. 270 (1941) 36

TABLE OF CONTENTS

CASES CITED:

Mattera, In re,
34 N.J. 259, 168 A.2d 38 (1961) 21

Michigan v. Tucker,
— U.S. —, 94 S. Ct. 2537 (1974) 28

Miranda v. Arizona,
384 U.S. 436 (1966) 28

Mitchum v. Foster,
407 U.S. 225 (1972) 4, 18-19, 20, 42

Penn. v. Stumpf,
308 F. Supp. 1238 (N.D. Ca. 1970) 37

Perez v. Ledesma,
401 U.S. 82 (1971) 20, 26, 37-38, 43

Pittsburgh Plate Glass Co. v. United States,
360 U.S. 395 (1959) 35

Samuels v. Mackell,
401 U.S. 66 43

Shaughnessy v. United States,
346 U.S. 206 (1953) (Jackson, J., dissenting) ... 26

Shaw v. Garrison,
467 F.2d 113 (5th Cir. 1972) 21, 38

Spevak v. Klein,
385 U.S. 11 (1967) 28

State v. Borg,
9 N.J. Misc. 59, 152 A. 788 (Sup. Ct. 1931) 35

State v. Clement,
40 N.J. 139 (1963) 34-35

TABLE OF CONTENTS

CASES CITED:

State v. Dayton,
23 N.J.L. 49 (Sup. Ct. 1850) 35

State v. Donovan,
129 N.J.L. 470 (1943) 35

State v. Garrison,
130 N.J.L. 350 (Sup. Ct. 1943) 35

State v. Grundy,
136 N.J.L. 96 (Sup. Ct. 1947) 35

State v. Redinger,
64 N.J. 41 (1973) 33

Steffel v. Thompson,
— U.S. —, 94 S. Ct. 1209 (1974) 19

Tumey v. Ohio,
273 U.S. 510 (1927) 47

United States ex rel. Birnbaum v. Dolan,
452 F.2d 1078 (3rd Cir. 1971) 39

United States v. Bryan,
339 U.S. 323 (1950) 35

United States v. Kahringer,
345 U.S. 22 (1952) 34

United States v. Knox,
396 U.S. 77 (1969) 34

United States v. Mandujano,
496 F.2d 1050 (5th Cir. 1974) 30, 33, 47

United States v. McKeaver,
271 F.2d 660 (2nd Cir. 1959) 35

TABLE OF CONTENTS

CASES CITED:

United States v. Raines,
362 U.S. 17 (1960) 27, 47

Virginia, Ex Parte,
100 U.S. 339 43

Williams v. Florida,
399 U.S. 78 (1970) 28

Younger v. Harris,
401 U.S. 37 (1971) 4, 12, 14, 15, 17, 19, 42, 43

FEDERAL RULE CITED:

Federal Rules of Civil Procedure,
R. 12(b)(6) 5, 12, 14, 17, 21, 40

N.J. RULES CITED:

N.J.Court Rules, 1:20 et seq. 21, 22, 23, 28

Rule 3:6-7 34

Rule 3:6-8 34

STATUTES CITED:

N.J.S.A. 2A:1B-2 through 9 21

N.J.S.A. 2A:1B-3-10 22

U.S. CONSTITUTION CITED:

Fifth Amendment 28

Sixth Amendment 36

TABLE OF CONTENTS

U.S. CONSTITUTION CITED:

Civil Rights Act of 1871, §1, Stat. 13 43

FEDERAL STATUTES CITED:

42 U.S.C. §1983 ..... 18, 36, 42, 43, 44, 45

28 U.S.C. §1343 18

28 U.S.C.A. §2283 ..... 43, 44

N.J. CONSTITUTION CITED:

Art. VI, §2, ¶¶1-3 (1947) 21, 22

Art. VI, §7, ¶1 22

Art. III, §1 (1947) 16, 35-36

AUTHORITY CITED:

Annot. "Inspection—Grand Jury Minutes," 3 A.L.R. Fed. 29 (1970) 35

TABLE OF CONTENTS

APPENDIX

ADDENDUM "A"

Testimony of: Patrick T. McGahn Jr., and Edwin H. Helfant Before: Hon. John J. Kitchen, U.S.D.J. Dated May 9, 1973, Camden, New Jersey A1

ADDENDUM "B"

Oral Opinion—No. 607-73 Before: Hon. John J. Kitchen, U.S.D.J. Dated May 9, 1973, Camden. New Jersey A33

ADDENDUM "C"

Letter Dated October 31, 1972 to John F. Callinan from Patrick T. McGahn, Jr. A36

ADDENDUM "D"

Affidavit of Samuel Moore A37

ADDENDUM "E"

Opinion in United States v. Mandujano A41

I. "Putative or Virtual" Defendant A45

II. Remedy for Failure to Give Miranda Warnings A50

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No.

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, Jr., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This is a Petition for a Writ of Certiorari to review a Judgment of the Court of Appeals for the Third Circuit, sitting *en banc,* entered on July 8, 1974. The judgment reversed an order of the District Court for the District of New Jersey which had dismissed Petitioner's complaint and denied his application for a preliminary injunction. The judgment of the Court of Appeals, which was issued in lieu of a formal mandate, directed the District Court to immediately conduct an evidentiary hearing and set forth findings of fact and conclusions of law in the form of a declaratory judgment. The judgment from which *certiorari* is sought limited the evidentiary hearing on remand to whether the Petitioner had been coerced out of his Fifth Amendment rights before the State Grand Jury by virtue of the action of the State Supreme Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, sitting *en banc*, has not yet been reported and appears in the addendum in Petition for Writ of Certiorari, No. 74-80, which has been previously filed by the Respondents herein. This Petition also seeks review of the *en banc* opinion of the court below, albeit for different reasons. The prior opinion of a three-judge panel of the United States Court of Appeals for the Third Circuit, which had also reversed the order of the District Court and had remanded the matter for an evidentiary hearing, has been published. *Helfant v. Kugler*, 484 F.2d 1277 (3rd Cir. 1973). The testimony taken in the District Court on the return date of Petitioner's order to show cause, May 9, 1973, appears in the addendum herein (AH 1, *et seq.*)*

* To clarify any references to petitions and addendums, the addendums herein will be cited AH for Addendum-Helfant. When referring to the addendum in Petition No. 74-80, reference will be to AK. All references to page numbers herein will read PH while references to pages in No. 74-80 will read PK.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1245(1). The order of the United States District Court for the District of New Jersey was entered on May 9, 1973. On August 6, 1973 the court granted Petitioner's motion for an accelerated hearing of the appeal. The hearing was held on September 7, 1973 and on that date the three-judge panel issued a preliminary injunction against the state-court trial, pending the issuance of a full mandate. On September 10, 1973 the court issued its opinion and order reversing the order of the district court. Based upon the State's representation that it would not move the state-court trial pending further proceedings, the Court of Appeals recalled its mandate to allow respondents herein to file a motion for rehearing *en banc*. On September 21, 1973 the Court of Appeals granted respondents' application for the rehearing *en banc*.

On July 8, 1974 the judgment in lieu of a formal mandate, reversing the order of the District Court and remanding the matter to the District Court for findings of fact and conclusions of law, was issued by the United States Court of Appeals for the Third Circuit, *en banc*. Respondents then moved to recall the mandate to allow for the filing of a petition for certiorari in this Court. The motion was granted on July 23, 1974 and the issuance of the mandate was stayed until August 7, 1974. The present petition followed.

QUESTIONS PRESENTED

1. Whether, on the basis of the record below and, given the interlocutory nature of the present Petition and Cross-Petition, the Petition of the State should be denied and the instant Cross-Petition granted?

2. Whether the "extraordinary circumstances" exception to the *Younger v. Harris* interdiction constitutes a distinct category suppporting federal intervention in a pending state criminal prosecution?

3. Whether the facts of this case present "extraordinary circumstances" under *Younger v. Harris*?

4. Whether the New Jersey Supreme Court in its interrogation of the Petitioner ten minutes before he was to appear to testify in the State Grand Jury, conducted with the aid of evidence supplied to the Court by the Deputy Attorney General conducting the Grand Jury proceedings, violated the doctrine of separation of powers provided for in both the Federal and New Jersey Constitutions and unconstitutionally deprived the Petitioner of his rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution?

5. Whether the conduct of the New Jersey Supreme Court and the Deputy Attorney General, taken in view of the organization of the New Jersey Court system, inflicted and continues to inflict irreparable constitutional injury upon the Petitioner, justifying federal intervention?

6. Whether the Court below erred in finding that the present case was not one of bad faith and in limiting the fact-finding to the coercion issue only?

7. Whether the Court below erred in finding the present case inappropriate for injunctive relief?

8. Whether *Mitchum v. Foster*, 407 U.S. 225 (1972) presents an exception to the *Younger v. Harris* interdiction, allowing a relaxation of the *Younger* dictates in cases arising under §1983 of the Civil Rights Act?

COUNTER-STATEMENT OF THE CASE

This is a case *sui generis*. Research has failed to discover anything similar on its facts and perhaps, nothing comparable will ever again arise in this or any other court. This case is brought before this Court for the review of an order granted pursuant to *Rule* 12(b) (6) and thus every allegation of the verified petition originally filed by Petitioner Helfant must be taken as true. *Littleton v. Berbling*, 468 F.2d 309, 329 (7th Cir. 1972); *Hackett v. McGuire Bros.*, 445 F.2d 422 (3rd Cir. 1971). Furthermore, this case is brought before the Court on a very limited record, a point which must be stressed. The only testimony taken was that of the Petitioner and Patrick T. McGahn, Jr., one of his co-counsel. The testimony was taken on May 9, 1973 on the return day of Petitioner's order to show cause why a preliminary injunction against the state criminal prosecution should not issue. This testimony may be found in the addendum herein (AH, 1).

The procedural posture of this case and the dearth of the record below must be stressed because the petition in No. 74-80 is replete with factual statements that are *dehors* the record, evasions, conjecture and speculation. Petitioner is reluctant to say this, yet a simple comparison between the statement of facts in the Third Circuit *en banc* opinion and that contained in petition No. 74-80 illuminates the point. The differences, evasions, conjecture, speculation, misstatements of fact *dehors* the record and misstatements of existing facts, will be taken up below as part of the factual and legal exposition.

The material facts of this case are a matter of record, and may be found in the verified complaint and the testimony taken in the district court. Petitioner Helfant is a member of the New Jersey Bar and municipal court judge

currently on leave of absence from that position (AH, 20). In his verified complaint dated May 2, 1973 (AK 64, *et seq.*) Helfant alleged that some time before October 18, 1972 the State of New Jersey began a Grand Jury investigation. As part of its duties, the specially created State Grand Jury was directed to investigate, among other matters, an alleged illegal withdrawal of an indictable criminal charge of atrocious assault and batttery in which the petitioner was alleged to have participated. The complaint had been filed in the Municipal Court of Egg Harbor, New Jersey. The State Grand Jury investigation in this matter was personally conducted by one of the defendants herein, Joseph A. Hayden, Jr., a Deputy Attorney General of the State of New Jersey.[1] It was alleged that Helfant represented one of the complainants who caused the complaint to be filed, that it was illegally and improperly dismissed with his help and that Helfant actually witnessed the withdrawal signature.

It was in connection with this matter and other matters that the Petitioner, pursuant to a subpoena, appeared before the New Jersey State Grand Jury on October 18, 1972. At this time, Helfant was advised that he was the target of the investigation. Upon learning of this, he refused even to go into the Grand Jury room. Accompanied by counsel, he was ordered to appear before the Assignment Judge of Mercer County, New Jersey, to determine whether, in fact, he should go into the Grand Jury room. The Assignment Judge directed Helfant to go into the Grand Jury room and, if Helfant so chose, to then rely upon his Fifth Amendment rights. The Petitioner on the same date unsuccessfully appealed to the Superior Court of New Jersey, Appellate Division, and

1. Mr. Hayden has subsequently left the Attorney General's Office and is currently engaged in private practice.

unsuccessfully attempted to appeal to the New Jersey Supreme Court. Unable to do this, he then appeared before the State Grand Jury, invoked his Fifth Amendment rights, and refused to answer any questions. Subsequently, while co-counsel Marvin D. Perskie was on vacation, a letter was directed to his partner by Patrick T. McGahn, Jr., co-counsel, which indicated that Helfant was again subpoenaed to appear before the State Grand Jury on November 8, 1972 and would likewise invoke his Fifth Amendment rights at that time (AH, 46).

On November 6, 1972 Helfant returned a telephone call that his office received from the Administrative Director of the New Jersey Courts. The Director informed Helfant that he was to appear before the New Jersey Supreme Court in private session on November 8, 1972 at ten minutes before ten o'clock in the morning. Helfant advised the Director that he had to be before the State Grand Jury at 10:00 A.M. The Administrative Director replied that he was well aware of that fact. He would not tell Helfant the reason for the meeting, though asked to do so.

On November 8, 1972 the Supreme Court sat in private session at its chambers at the New Jersey State House Annex in Trenton, New Jersey. At the other end of the hall was the meeting room for the State Grand Jury, which was then in session.

The Petitioner appeared at the appointed time on November 8th. He was preceded into the New Jersey Supreme Court chambers by Deputy Attorney General Hayden, who was carrying a file which now for the first time the State has revealed to be the raw grand jury minutes (PK, 13). Helfant entered the chambers and was confronted by the Court sitting in its robes. Various members of the Supreme Court began to question him.

The Chief Justice immediately inquired of the defendant whether he thought a judge should invoke the Fifth Amendment. Justice Sullivan asked what the defendant's feelings were about a judge sitting in judgment of other people while he himself was invoking the Fifth Amendment before the Grand Jury. He also asked Helfant if he had sat as a judge since invoking the Fifth Amendment. The Chief Justice then resumed the questioning, asking Helfant questions about incidents that had been brought before the State Grand Jury and had not been made public. These incidents were contained in the Grand Jury minutes obtained and studied by the Supreme Court at its request. For example, did Helfant have knowledge of an ice machine that was alleged to have been illegally given to a New Jersey County Court Judge; what part had Abe Schusterman, a convict who testified against Helfant in the Grand Jury, in supplying certain liquor for the Bar Mitzvah of Helfant's son; what had been the seating arrangement at this Bar Mitzvah and who was present? The Chief Justice only cut off discussion about the merits of the criminal matter when Helfant tried to explain why he had previously resorted to the Fifth Amendment. The true coercive purpose of the Court was borne out by the very last question posed to Helfant by the Chief Justice: "What do you intend to do today?"

Samuel Moore, Helfant's co-defendant,[2] had also been called to the Supreme Court Chambers and, in fact, followed Helfant into the chambers. With him, he brought the original complaint which allegedly had been improperly dismissed. This is and was the central exhibit in the entire prosecution. There was affixed to the complaint a signed withdrawal allegedly witnessed by Helfant. Helfant's signature was at issue and had been the subject of ex-

2. Judge Moore has subsequently died. He was not a "critical witness" as the State has characterized (PK 62), but a co-defendant!

pert testimony before the State Grand Jury. The Chief Justice proceeded to discuss with Moore the validity of Helfant's signature with the complaint spread out before the Court. Furthermore, the Chief Justice asked Moore about the reliability of certain law firms in Atlantic City, New Jersey which were involved in the case. In short, the New Jersey Supreme Court was considering the main exhibit in a criminal case and investigating the validity of Helfant's signature allegedly thereon, *i.e.*, the minutes of the grand jury investigation. This completely belies the allegation of the State that the Court was merely attempting to determine whether the two judges intended to remain on the bench in their temporary positions.

Helfant then emerged from the chambers. His co-counsel, who testified before the Federal District Court, dramatically described Helfant's demeanor and appearance when he emerged. Helfant was very, very upset and appeared completely white and shaken. Counsel, as stated in the record, simply could not get through to him. Against the vigorous protests of both co-counsel, Helfant indicated he would testify because he was fearful that failure to do so would result in the loss of his license to practice and of his two judgeships. Obviously, the experience and encounter with the Supreme Court had had its intended effect. Helfant's will was broken, his resolve shattered. He was literally frightened beyond the reach of legal advice. His determination shaken, the entreaties of his lawyers to no avail, Helfant walked the very short distance between the Supreme Court chambers to the grand jury room down the hall, appeared before the State Grand Jury and testified.

Prior to Helfant's testimony, the State had called before the State Grand Jury and intended to recall as witnesses, three convicted criminals who were then in State prison: John Cantoni, Sheldon Kravitz and Abe Schuster-

man.[3] Helfant knew that they had testified against him. Thus, when he was called before the State Grand Jury he was in an inextricable position: once he testified, and if he agreed with their testimony, he implicated himself in an alleged criminal conspiracy; if he disagreed with them, he was subject to a charge of false swearing. This was the manner in which the Grand Jury was being conducted by Deputy Attorney General Hayden and this was the procedural framework facing Helfant when he testified on November 8, 1972. The result of Helfant's testimony was an indictment charging him with conspiracy to obstruct justice, obstruction of justice, compounding a felony and *four counts of false swearing.*

As a result of the actions of the New Jersey Supreme Court and Deputy Attorney General Hayden, on May 2, 1973 Helfant filed a verified complaint and order to show cause in the United States District Court for the District of New Jersey. The gist of his complaint may be summed up in Paragraph 14 thereof:

> "14. As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal

3. Each one of whom received promises of immunity for their appearances and other substantial concessions and promises of recommendations for doing so, which has been admitted by the State in discovery furnished in the State criminal proceedings. As a matter of fact, Kravitz and Schusterman are now at liberty as a result of the intercession of the Attorney General's Office. Kravitz has returned to the bar business, his disqualification to hold a liquor license removed.

> charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State Government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle co-operative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the "interest" of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he alleges has unlawfully injected itself into the prosecution of the charges against him and unlawfully deprived him of his constitutional rights. *The conclusion must be that the State is engaged in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under* 28 *U.S.C.*, §2283" (AK, 70) (emphasis added).

The return date of the order to show cause was May 9, 1973. On that date testimony was taken of Helfant and Patrick T. McGahn, Jr., one of his co-counsel who was present on November 8, 1972. Some of that testimony has been cited in the Court of Appeals' *en banc* decision (AK, 10). In essence, Helfant testified consistently with the averments of his complaint and the overwhelming and devastating effect that the encounter with the Justices had upon him. Mr. McGahn testified that Helfant had intended to take the Fifth Amendment on November 8th prior to

entering the Supreme Court chambers and told how Helfant emerged shaken and distraught from the chambers and, against the advice of both counsel, and as a result of this encounter, informed counsel that he would testify.

In an oral opinion, the district court denied preliminary injunctive relief on the ground that *Younger v. Harris*, 401 U.S. 37 (1971), precluded federal intervention. It also granted the State's motion and dismissed the complaint for failure to state a claim for which relief might be granted. As the *en banc* opinion recognized, the case came to it subsequent to a *Rule* 12(b)(6) motion (AK, 11). As it further recognized, although an evidentiary hearing on the injunction request had been conducted and the court had made limited findings on this issue,

> " . . . it did not find facts with respect to the merits of Helfant's §1983 claim. Thus, there have been no fact findings on the crucial issue of whether Helfant's testimony before the grand jury was the product of his free and unconstrained will" (AK, 11-12).

Thus, as the Court of Appeals recognized and as must be stressed herein, there was only a limited record made below. Only Petitioner introduced testimony, and this testimony was wholly corroborative of his complaint. The State did not introduce any testimony and did not in any way seek to refute the material allegations of the complaint. To this date, under the facade of a flurry of legal maneuvers, it has continued to avoid an examination of the facts within its control. Therefore, as the *en banc* decision below recognized "we must take as true Helfant's allegations. . . ." (AK, 12).

The case was in this procedural posture when it was brought before the three-judge panel on September 7, 1973. In an order dated September 10, 1973 and in an

opinion, the three-judge panel reversed the order of the district court. Its holding first recognized that there was a distinct and separate category of "extraordinary circumstances" under *Younger* and that the present fact situation came within that special category (AK, 55). It said:

> "Exceptional circumstances, then, must include circumstances reflecting upon the likelihood that the state forum will afford an adequate remedy at law. If the circumstances here alleged do not fall within that category, it would be difficult to imagine any that would. If it is true that Helfant is being tried on an indictment which resulted from his testimony before the grand jury coerced from him by the Supreme Court of New Jersey, his Fifth Amendment privilege against self-incrimination has already been violated, and the effect of that violation is, by virtue of the ongoing prosecution, continuing. Since the Supreme Court of New Jersey is accused of having exercised the coercion, a remedy in the courts of New Jersey and ultimately in that Court, hardly seems adequate" (AK, 55-56).

Subsequent to this opinion, the State petitioned for a rehearing *en banc*. In an order dated October 31, 1973 the petition for rehearing before a three-judge panel was granted and the court ordered supplemental briefing on the coercion issue (AK, 39-40). Subsequent to the filing of the supplemental briefs, the court, in an order dated January 11, 1974, relisted the case for a rehearing before the Court of Appeals, *en banc* (AK, 38). On April 10, 1974 the appeal was argued (AK, 5). The opinion of that court was filed July 8, 1974. The opinion also reversed the order of the District Court and reinstated the complaint. Considerably narrowing the scope of the relief sought, however, the court remanded the case to the United States District Court for a proceeding, "limited to a determination of whether Helfant's testimony before the State

Grand Jury on November 8, 1972 was a product of a free and unconstrained will." It ordered that the district court "issue a declaratory judgment setting forth this conclusion" (AK, 23).

The *en banc* opinion also recognized that there was a separate and distinct category of "extraordinary circumstances" under *Younger v. Harris, supra*, (AK, 12). It found that a predicate of *Younger* was an assumption that the defense of the pending state prosecution would afford an adequate remedy at law for vindication of any federal constitutional rights at issue. The court thus predicated "extraordinary cicumstances" to an "inability of the state forum to afford an adequate remedy at law" (AK, 12-13).

The certified judgment in lieu of mandate embodying the decision of July 8, 1974 was filed by the court on that date (AK, 3). The State then again petitioned the court to recall its judgment in lieu of formal mandate and to clarify its opinion regarding the four counts of false swearing contained in the State's indictment. In an order dated July 23, 1974 the Court of Appeals recalled its certified judgment in lieu of mandate and stayed the issuance thereof until August 7, 1974. The other relief requested was denied.

In conclusion, this case thus comes before this Court after two hearings in the United States Court of Appeals for the Third Circuit and after two opinions entered in that court in favor of Petitioner. Furthermore, this case comes before the Court subsequent to the granting of a *Rule* 12(b) (6) motion and upon a limited record consisting of testimony totally favorable to the contentions of the Petitioner. Under these circumstances, it is respectfully submitted, and will be shown below, that there is an insufficient record to support the granting of the writ in

No. 74-80. It is further submitted that given the procedural posture of this case, in which all of Helfant's allegations must be considered as true, there is a sufficient record to allow this Court to deal with the contentions of the Petition herein. It is respectfully submitted that only the present Petition be granted so that the significant issues raised herein may be reviewed by this Court and that there might be a full evidentiary hearing to include the determination whether there was bad faith, whether the case falls within the "extraordinary circumstances" category of *Younger v. Harris, supra*, and whether, assuming Helfant's contentions to be true, this would be a proper case for a federal injunction.

REASONS FOR GRANTING THE WRIT

Introduction

This case brings before the Court a factual complex that is probably *sui generis*. Alleged in the complaint are allegations that the highest Court of the State of New Jersey collaborated with a Deputy Attorney General conducting an ongoing State Grand Jury investigation to coerce the Petitioner, Helfant, into foregoing his Fifth Amendment rights and in pursuance of this end, demanded, received and improperly considered Grand Jury minutes and exhibits of an investigation which had not concluded.

It is further alleged that the same Deputy Attorney General divulged raw grand jury data to the court in violation of and in contradiction to the sacred doctrine of separation of powers, *N.J. Const.* Art. III, §1 (1947) and that this was prosecutorial misconduct. Lastly, Petitioner alleges violations of his Fourteenth Amendment procedural due process rights and Sixth Amendment right to a fair trial and counsel arising out of the unlawful procedure utilized by the New Jersey Supreme Court to "investigate" (PK, 27) alleged judicial misconduct by Helfant. In essence, the factual complex literally presents a "breakdown of the State judicial system. . . ." *Allee v. Medrano*, — U.S. —, 94 S. Ct. 2191, 2210 (1974) (Burger, Ch. J concurring) and that the complaint charges that Helfant, as an individual, is being "deprived of meaningful access to the State Courts. . . ." *Id.* Also implicated is the right of an individual to be tried in a State court system without even the hint of impartiality. Thus, some of the basic tenets of our democracy are being brought into question.

Indeed, this case brings an extraordinary factual situation before this Court. As was said in the opinion of the three-judge panel which initially heard the appeal below:

> "If the circumstances here alleged do not fall within that category [of extraordinary circumstances] it it would be difficult to imagine any that would" (AK, 55).

What is involved here is the illegitimate abuse of State power and a resort to our federal court system to alleviate the abuse. For the federal courts to abstain in this situation would be that "blind deference to 'States' Rights'" which even the *Younger* opinion found impermissible. *Younger v. Harris, supra,* 401 U.S. at 44. This is a situation in which the appearance of impartiality, the appearance of justice, mandates federal court interference with the state court's procedure. If the present case does not represent "extraordinary circumstances" under *Younger* then, it is submitted, no case ever will, and that language which has been construed by later cases as creating a separate category allowing intervention will henceforth be of no further legal effect. It is doubtful whether this Court would indeed want that construction placed upon *Younger*.

The "extraordinary circumstances" doctrine

At the outset, the procedural posture of the present appeal should be emphasized. First, in reviewing the dismissal of the complaint in the district court, the reviewing court must liberally construe the complaint and consider all of the allegations to be true. *See Rule* 12(b)(6), *Federal Rules of Civil Procedure.* All doubts are to be resolved in plaintiff's favor. *Littleton v. Berbling,* 468 F.2d 309, 329 (7th Cir. 1972); *Hackett v. McGuire Bros.,* 445 F.2d 322 (3rd Cir. 1971). As this Court has stated, the standard should be whether the action is so patently

without merit to justify dismissal of the complaint. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). Thus, the allegations of the complaint are entirely true for the purpose of this Petition. Furthermore, it should again be noted that the only testimony taken on the return date of the order to show cause on May 9, 1973 was that elicited on behalf of plaintiff and that this testimony currently remains uncontradicted.[4]

There can be no doubt that a Federal Court does have jurisdiction to grant an injunction, 42 U.S.C. §1983, to redress the deprivation of "any rights, privileges or immunities secured by the constitution. . . ." *See* 28 U.S.C. §1343 (3). And this Court has held that this action may be by means of an injunction, *Mitchum v. Foster*, 407 U.S. 225

4. This is a crucial fact which cannot be overstressed in this Petition. Petition No. 74-80 is replete with evasions, conjecture, speculation and many statements of fact which are not in the record below. First, there is nothing in the record which discloses that Helfant's appearance before the Grand Jury "received some public notoriety and was disclosed in several newspapers in the state" (PK, 13). Furthermore, there is nothing in the record indicating that the Administrative Director of the New Jersey Courts in accordance with "settled practice" informed the Supreme Court of this (*Id.*). Neither is there anything indicating that the Administrative Director was instructed to obtain a report from the Attorney General handling the matter and all relevant Grand Jury testimony. (*Id.*) There is also nothing in the record below indicating that the New Jersey Supreme Court had directed the Administrative Director to ask both Helfant and Moore to meet with it in a private conference room on that date. There is nothing in the record indicating what the purpose of this meeting was to be (*Id.*). Nor was there anything in the record which indicates that the New Jersey Supreme Court is duty bound to inquire into allegations of judicial misconduct and that these investigations do not generally await the conclusion of pending or related criminal charges. Nor does anything in the record indicate that the New Jersey Supreme Court often takes preliminary steps to determine whether disciplinary proceedings are required prior to disposition of a criminal case (PK, 27 and n.10 thereunder). These misstatements cannot be over-emphasized. It is indeed sad that the State has seen fit to so distort the actual record in this case and bring so many innuendoes and actual misstatements before this Court. Helfant takes no issue with the power of the Supreme Court of New Jersey to supervise the Judges and administer the Court system of the State nor with its power to discipline members of the bench and bar. However, a hearing on judicial impropriety without notice, without counsel, without a fair hearing, held ten minutes before a Grand Jury proceeding, finds no support in Court Rules, State Statutes, Constitutional law or, for that matter, in anything in the American system of jurisprudence.

(1972) or by declaratory judgment, *Steffel v. Thompson*, — U.S. —, 94 S. Ct. 1209 (1974).

When a suit seeks to enjoin a pending state criminal prosecution the dictates of *Younger v. Harris*, 401 U.S. 37 (1971) and its companion cases must of necessity come into play. In *Younger*, Justice Black re-emphasized the principles that should govern a federal court when it is asked to intervene in state criminal proceedings.

First, he said that a court of equity should not act to restrain a criminal prosecution when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief, 401 U.S. at 43-44. Secondly, he stressed, as a valid consideration, the notion of comity, *i.e.*, a proper respect for state functions. As was said, however, adherence to notions of comity does not mean:

> " . . . blind deference to 'States' rights' any more than it means centralization of control over every important issue in our National Government and its courts. • • • What the concept does represent is a system in which . . . the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States" 401 U.S. at 44.

Thirdly, the opinion stressed the need for a showing of irreparable injury both great and immediate. The opinion said that the cost, anxiety and inconvenience of defending against a single criminal prosecution, "could not by themselves be considered 'irreparable' in the special legal sense of that term" 401 U.S. at 46. *See, Leslie v. Matzkin*, 450 F.2d 310, 312 (2d Cir. 1971). (There were no special circumstances in the case that could justify the granting of an injunction). Thus, the opinion recognized that

without the showing of something more, the threat to a plaintiff's federally protected rights had to be one that could not be eliminated by his defense against a single criminal prosecution. As indicated by Justice Stewart in his concurring opinion, if there had been "official lawlessness" the requirement of irreparable injury could be satisfied. 401 U.S. at 56 (Stewart, J. concurring).

Lastly, as Justice Black pointed out, the dictates of the *Younger* opinion were by no means a complete limitation upon the situations in which a federal court could intervene in state criminal proceedings. As he wrote, "other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." 401 U.S. at 54. In the companion case of *Perez v. Ledesma*, 401 U.S. 82, 85 (1971) this thought was reiterated:

> "Only in cases of proven harassment with prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate."

That there is a separate "extraordinary circumstances" exception to *Younger's* interdiction has been recognized by statements in later cases in this Court. *See, e.g., Mitchum v. Foster*, 407 U.S. 225, 230 (1972); *Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498, 510 (1972). In *Allee v. Medrano*, — U.S. —, 94 S. Ct. 2191, 2209 (1974) (Burger, Ch. J. concurring) it was said:

> "The injury must include, except in extremely rare cases, the usual prerequisites of bad faith and harassment."

Moreover, lower federal court cases also have recognized that the "extraordinary circumstances" exception constitutes a distinct category. *See, e.g., Lewis v. Kugler,* 446 F.2d 1343 (3rd Cir. 1971); *Shaw v. Garrison,* 467 F.2d 113 (5th Cir. 1972). As was said in *Hobbs v. Thompson,* 448 F.2d 456, 465 (5th Cir. 1971):

> "The opinion [in *Younger v. Harris*] does not purport to extend beyond this traditional realm of comity and require across-the-board abdication of federal decision-making power in all manner of cases."

These cases demonstrate that an "extraordinary circumstances" exception does exist as a separate and distinct category supporting federal intervention. This being shown, the next question now becomes whether the facts in this case, coming before this Court after a *Rule* 12(b)(6) order, fit within this category. It is respectfully submitted that they are of the most "extraordinary" character.

The application of the "extraordinary circumstances" exception to the facts of the present case

As was recognized by the majority opinion below (AK, 13, *et seq.*), the New Jersey Supreme Court is not only the highest court in the State, but "is charged with responsibility for the overall performance of the judicial branch." *In re Mattera,* 34 N.J. 259, 168 A.2d 38, 45 (1961). The Court has the power to make rules governing the lower New Jersey courts and to enforce them. *Id.* In fact, the New Jersey Constitution,[5] statutory law,[6] and rules of court[7] confer the broadest administrative power on the Court over the bench and bar.

---

5. *N.J. Const.* Art. VI, §2, ¶s 1-3 (1947).

6. *N.J.S.A.* 2A:1B-2 through 9.

7. *N.J. Court Rules,* 1:20-1 *et seq.*

> "The intent of the 1947 Constitutional Convention was to vest the Supreme Court with the broadest possible administrative authority. *Lichter v. County of Monmouth*, 114 N.J. Super. 343, 349, 276 A.2d 382, 385-86 (1971)."

The New Jersey Constitution provides that the Chief Justice of the Supreme Court is the "administrative head of all the courts in the State". Art. VI, §7, ¶1. This imbues the Chief Justice with the power to:

> " . . . assign Judges of the Superior Court to the Divisions and parts of the Superior Court, and . . . from time to time transfer Judges from one assignment to another. . . . " N.J. Const. Art. VI, §7, ¶2.

It is clear that the New Jersey Supreme Court is much more than an appellate court. It is the overseer of the bench and bar in the State and is vested with formidable supervisory and administrative power over both.

Distinct statutory procedures and rules govern the exercise by the Court of its power to remove judges or discipline members of the bar. Under *N.J.S.A.* 2A:1B-3, a proceeding for the removal of a judge may be instituted by either house of the Legislature, the Governor, by the filing of a complaint, or "by the Supreme Court on its own motion." Full due process rights and protections are afforded a judge during these proceedings. *See, N.J.S.A.* 2A:1B-3 through 10. And, the judge may be removed only if the Supreme Court "finds beyond a reasonable doubt that there is cause for removal. . . . *N.J.S.A.* 2A:1B-9.

Similar protections are afforded the lawyer facing disciplinary proceedings. *N.J. Rules of Court*, 1:20-1 *et seq.* If a disciplinary committee receives a complaint, or is directed by the Supreme Court to investigate a member of the bar,[8] it prepares a statement of charges.[9] A complaint

is then issued and served[10] and a preliminary investigation made.[11] The committee then either dismisses the complaint or, if it finds unethical or unprofessional conduct, prepares a presentment which it files with the Supreme Court.[12] That Court then determines if it shall issue an order to show cause why the attorney should not be "disbarred or otherwise disciplined."[13] A hearing is held in the Supreme Court itself on the order. It is important to note that all records, files and meetings are confidential, *Rule* 1:20-3(b), and all briefs, papers and exhibits submitted to the Supreme Court are impounded by the Clerk. *Rule* 1:20-8. In these disciplinary proceedings, as in the removal proceedings, full due process rights are afforded.[14]

An examination of the record indicates that Petitioner was never afforded any of these protective procedures. He was ordered by the Administrative Director of the New Jersey courts to appear in chambers *ten minutes* before a Grand Jury appearance. He was not told any reason for the meeting. The Deputy Attorney General conducting the Grand Jury investigation preceded him, carrying a file. Once inside, he was questioned by the Chief Justice and another Justice about his intention regarding the Fifth Amendment. The Chief Justice questioned him about an ice machine and about the Bar Mitzvah of Helfant's son (AH, 26), matters which were currently under investigation! The Court was preoccupied about Helfant's intentions about testifying before the Grand Jury.

8. *Rule* 1:20-2(b).
9. *Id.*
10. *Rule* 1:20-4(b).
11. *Rule* 1:20-4(c).
12. *Rule* 1:20-4(h).
13. *Rule* 1:20-4(i); *Rule* 1:20-8.
14. The protections afforded by the rules were recognized in *DeVita v. Sills*, 422 F.2d 1172 (3rd Cir. 1970) and thus the Court of Appeals for the Third Circuit upheld them.

Moreover, Helfant's co-defendant, Samuel Moore, was also called before the Supreme Court immediately after Helfant. He brought with him the complaint which constituted the State's primary exhibit. The Chief Justice discussed the complaint and Helfant's signature and further discussed matters that were being presented before the Grand Jury. Thus, the allegations by the State that the merits of the underlying controversy were not discussed is simply not true. The record does not support these allegations, but directly contradicts them.[15]

On the basis of the record below, it is thus evident that Helfant is being subjected to a State prosecution tainted by collusion between the executive branch, through Deputy Attorney General Hayden, and the judicial branch, through the highest court of the State. This collusion, as alleged in the complaint, not only worked to coerce Helfant into foregoing his Fifth Amendment rights, but also worked to deprive him of procedural due process and of his Sixth Amendment right to counsel and fair trial (as will be shown below). Helfant has alleged that this illegal participation by the Supreme Court has tainted the entire State proceeding. Nothing in the record shows the contrary, notwithstanding the State's unsupported allegations that there is no reason to assume that the "entire State judicial system is morally and ethically bankrupt" (PK, 33). What is crucial to the present determination is the realization that the record below supports only Petitioner's case.

Moreover, based on that record, can it be said that "extraordinary circumstances" do not here exist? As the *en banc* decision recognized, the *allegation* has been made of a tainted prosecution (AK, 15). The New Jersey

15. See (PK, 14-15). Also, Moore, the *co-defendant*, executed an affidavit to this effect on September 21, 1972 which is part of the record (AH, 47).

court structure, in imbuing the Chief Justice and Supreme Court with tremendous power over the bench and bar, at least facially supports the allegation of the possibility that the "brooding omnipresence" of the New Jersey Supreme Court could affect a trial judge seeking to make a determination of the voluntariness issue (AK, 21).[16] On the basis of this record, it is respectfully submitted that it cannot be said that the opinion below erred in its determination that "extraordinary circumstances" exist.

Furthermore, if Helfant lost the voluntariness issue in the trial court, his ultimate appeal would necessarily have to be to the very court alleged to have been collusively engaged in the coercion! As both the *en banc* decision (AK, 12) and the decision of the three-judge panel recognized (AK, 55), the predicate of *Younger v. Harris* is an assumption that the defense of the pending state prosecution would afford an adequate remedy at law for the vindication of the federal constitutional rights at issue. As they further recognized, exceptional circumstances "must include circumstances reflecting upon the likelihood that the State forum will afford an adequate remedy at law. . . ." (AK, 55; *see* AK, 12-13). As was said in *Fenner v. Boykin*, 271 U.S. 240, 244 (1926):

> "The accused should first set up and rely upon his defense in the state courts . . . unless it plainly appears that [this] course would not afford *full* protection"[17] (emphasis added).

Obviously, any resort to the New Jersey court system, as a matter of law, would not afford "full protection" and

16. As the opinion recognized, this factual determination would have to be made by a State Judge, "subject to the 'absolute and unqualified' administrative power of the Supreme Court. . . ." (AK, 16).

17. The New Jersey courts have rejected all of Petitioner's efforts to quash the indictment on the ground that they were based on coerced testimony (AK, 13).

thus "if the circumstances here alleged do not fall within that category [of extraordinary circumstances] it would be difficult to imagine any that would." (AK, 55, opinion of three-judge panel).

Based upon the present record there are ample facts to justify, at the least, federal intervention for the purpose of federal fact-finding herein. *See, Conover v. Montemuro,* 477 F.2d 1073 (3rd Cir. 1973).

The irreparable injury requirement

It has been shown above that the allegations of the complaint and the limited record more than support a finding that "extraordinary circumstances" exist to warrant federal intervention herein. As in every case in which an injunction is sought, "irreparable injury" must be shown. *Perez v. Ledesma, supra,* 401 U.S. at 85. As will be shown below, Petitioner has suffered and continues to suffer unconstitutional injury which is truly irreparable.

As was shown above, distinct statutory procedures and rules exist which govern the Supreme Court in the exercise of its power to remove judges and discipline members of the bar. These procedures protect the individual and insure procedural regularity and due process of law. *See, De Vita v. Sills,* 422 F.2d 1172 (3rd Cir. 1970). Yet, the record indicates that even if the New Jersey Supreme Court was contemplating legitimate disciplinary proceedings, it completely neglected to abide by its own procedures. *Cf. City of Lawrence v. Civil Aeronautics Bd.,* 343 F.2d 583 (1st Cir. 1965). Consequently, the complaint legitimately raises a procedural due process claim. The magnitude of the deprivation of procedural due process is probably best articulated by Mr. Justice Jackson in his dissenting opinion in *Shaughnessy v. United States,* 346 U.S. 206, 224 (1953) (Jackson, J., dissenting):

> "Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. * * * Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."

The failure of the New Jersey Supreme Court to abide by the applicable statutes and rules thus has raised Helfant's Fifth Amendment claim in a due process sense. *See, United States v. Raines*, 362 U.S. 17 (1960); *Buchalter v. New York*, 319 U.S. 427 (1943). The State argues that the procedure utilized by the Court here was "recognized and established through State constitutional and statutory law" (PK, 40) and that the Supreme Court's obligation to the bench, bar and public sometimes forces the Supreme Court to act prior to formal indictment (PK, 33). The simple answer, of course, is that there is nothing in the record to support this bald assertion; in fact, this is the first time this has been raised as a justification! Moreover, even if this were the actual situation, there is nothing in the statutes or rules which allows the Court to summarily interrogate a judge or lawyer prior to the institution of formal proceedings (and especially ten minutes before a scheduled grand jury appearance). In essence, there is not one word of testimony to support the State's assertion that the Supreme Court was engaged in any legitimate inquiry.[18] The facts in the record simply belie it.

Moreover, the failure of the New Jersey Supreme Court to abide by established law and its own rules also

---

18. As will be discussed below, the facts if anything, indicate a bad faith attempt at coercion.

deprived Petitioner of his right to counsel, mandated by both the *New Jersey Court Rules*, 1:20-1 *et seq.* and the Sixth Amendment. U.S. Const. Amend. 6. *Cf. Coleman v. Alabama*, 399 U.S. 1 (1970); *Conley v. Dauer*, 463 F.2d 63 (3rd Cir. 1972); *See also, Johnson v. Avery*, 393 U.S. 483, 490 n. 14 (1969); *Spevak v. Klein*, 385 U.S. 11 (1967).

Once it is understood that the inquiry was indeed constitutionally illegitimate, the proper legal framework of the coercion issue takes shape. While there can be no doubt that *lawful* investigatory conduct may possess a "compelling atmosphere"[19] or create a "Hobson's choice"[20] for an individual, unlawful or illegitimate conduct renders the product of that conduct illegal, incompetent and inadmissible. *Cf., Miranda v. Arizona*, 384 U.S. 436, 466 (1966). It is the *procedure* causing the compulsion which must be examined to determine the legal consequences of the official action. In other words, if a defendant signed a sworn confession exacted from him in violation of *Miranda*, there could be no question that he could not be prosecuted for perjury, should the confession prove false. *Cf. Williams v. Florida*, 399 U.S. 78 (1970).

This argument gains more force when the rationale behind the Fifth Amendment is examined. It is clear today that the purpose of the Fifth Amendment is to deter illegal governmental action. *See, e.g., Michigan v. Tucker*, — U.S. —, 94 S. Ct. 2537 (1974); *Jackson v. Denno*, 378 U.S. 368 (1969); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Culombe v. Connecticut*, 367 U.S. 568 (1961). *Cf. Garrity v. New Jersey*, 385 U.S. 493 (1967). The product of that conduct may indeed have great relevance

19. *Miranda v. Arizona*, 384 U.S. 436, 466 (1966).
20. *Id.*

to crucial issues of guilt or innocence. But this is not the focus of the inquiry; the focus is upon the governmental action. Here the Supreme Court illegally interrogated Helfant, summoning him to its chambers when it had absolutely no right to do so, ten minutes before a grand jury appearance of which it knew. Anything exacted from him as a result of this confrontation is illegal. With this analysis in mind, there can be no doubt that Helfant has suffered and continues to suffer irreparable constitutional harm which is both great and immediate.

Moreover, the magnitude of the due process violation increases if one examines the entire factual pattern alleged in the complaint. Prior to Helfant's testimony three convicted felons, John Cantoni, Shelly Kravitz and Abe Schusterman, testified in the grand jury under a grant of immunity. They were all summoned there by Deputy Attorney General Hayden and testified pursuant to promises of concessions and recommendations of leniency by the State (which fact has been admitted by the State. See note 3 herein). Thus, the testimony before the grand jury had been structured, or in other words, "set up" prior to November 8, 1972. Previously, Helfant had resorted to the Fifth Amendment and had every intention to do so on this date. Moreover, this fact must have been known to the Supreme Court because the State has now admitted for the first time that the grand jury minutes were turned over to the Court prior to Helfant's entrance into chambers on November 8th. Similarly, the Court must have also known of the testimony of Cantoni, Kravitz and Schusterman. When he was called into chambers, Helfant was immediately confronted with questions about his resort to the Fifth Amendment and was asked upon leaving by the Chief Justice, "What do you intend to do *today*?" Helfant,

fearful and overwrought, conceiving that his livelihood was at stake, testified before a grand jury that had been structured to indict him for some offense if he testified.

As alleged, the facts of Helfant's complaint bring it squarely within the four corners of *United States v. Mandujano,* 496 F.2d 1050 (5th Cir. 1974) a case remarkably similar on its facts and directly on point in its holding (which is reprinted in full in the addendum herein (AH, 51).

In that case, the defendant appeared before a Grand Jury investigating alleged narcotics violations in the district. The United States Attorney had received a report from a narcotics agent that he had previously attempted to offer defendant money for the purchase of heroin. The United States Attorney had questioned the agent of the circumstances of this attempted buy in preparation for Mandujano's appearance before the grand jury. When Mandujano appeared to testify the agent had preceded him detailing the circumstances of the attempted buy. The government attorney questioned Mandujano, tracking the exact facts of the actual contact between the federal narcotics agent and Mandujano. The defendant was subsequently indicated for perjury. The perjury was based upon Mandujano's denial before the grand jury of any attempt to obtain or sell heroin or any solicitation to do so.

The defendant then moved to suppress his testimony before the grand jury. The district court granted the motion expressing itself in words quite appropriate to the present case:

> "Considering the totality of the circumstances in this case, the questioning of the defendants before the grand jury smacks of entrapment. • • • If the de-

> fendants admitted that they had offer [*sic*] to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. • • • The denial by defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. *Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them*" (emphasis added). *United States v. Mandujano*, 365 F. Supp. 155, 158-59 (W.D. Tex. 1973).

The United States Court of Appeals for the Fifth Circuit affirmed. It first recognized that there was no basis for the perjury indictment prior to Mandujano's testimony. If the government attorney actually anticipated any answers, the court found, he must have known that the responses would require defendant to either confess to a crime or commit perjury. (Slip opinion at 5255). The inference was that the questioning was primarily aimed at baiting defendant to commit perjury. Thus, the only "safe harbor" for the defendant was to keep silent, a right of which the government failed to inform him. Although the court recognized that *Glickstein v. United States*, 222 U.S. 139 (1952) and other cases held that the Fifth Amendment does not allow a person to commit perjury, it distinguished the case on several important factors. First, *Glickstein* involved no governmental misconduct. As the Court said, "we simply cannot ignore the unfairness in baiting this defendant before the grand jury. . . ." (Slip opinion at 5259). Thus, as a deterrent to any future prosecutorial misconduct the court ordered suppression of the testimony. *(Id.)*

More importantly, the court held that the:

> " . . . entire proceedings here which led up to Mandujano's indictment for perjury were, as we have noted repeatedly, beyond the *pale of permissible prosecutorial conduct*. We conclude that the entire proceeding was a violation of Mandujano's due process rights. (Slip opinion at 5262-63, emphasis in original.)

As the court concluded, an asserted denial of due process is tested by the totality of the facts of the given case. Here the conduct was so "offensive to the common and fundamental ideas of fairness" as to amount to a violation of due process (slip opinion at 5263). It thus affirmed.

The present case involving Helfant is far stronger. The testimony against Helfant did not come from a federal narcotics agent, but from three convicts then in jail who were granted immunity for their testimony and promises of recommendations of leniency (which have been carried out). Secondly, the misconduct was not limited, as it was in the *Mandujano* case, to a prosecutor calling in a prospective defendant knowing that he had been involved in wrongdoing and would not be in a position to admit it before a Grand Jury. In the present case it was a combined action of prosecutorial misconduct and *judicial lawlessness* which coerced and frightened the petitioner out of the exercise of his Fifth Amendment rights. As in the *Mandujano* case, the proceedings smacked of an attempt to entrap the defendant to either incriminate himself or commit perjury. The proceeding in *Mandujano* was found to be violative of due process. Certainly, nothing could be more shocking to common notions of fairness than judicial-executive collusion. There can be no doubt that Petitioner has suffered, and continues to suffer, a massive violation of his due process rights. Thus, the State cannot legally or analytically distinguish, under *Mandujano*, the false swearing counts of the State indictment.

The present case is also on all fours with those of a recent New Jersey case, *State v. Redlinger,* 64 N.J. 41 (1973). Here, Redinger's co-defendant had been charged in municipal court with careless driving. On the return day of the summons, Redinger appeared for his co-defendant and testified that he had been driving the offending vehicle. Consequently, the ticket was dismissed and a ticket for careless driving was issued against Redinger. Subsequently, but prior to the return date of Redinger's ticket, the police obtained sworn statements from two individuals who had seen Redinger's co-defendant driving the car during the offense. When Redinger appeared in court, he pleaded guilty to the offense; the Judge stated, however, that he wanted the story under oath. Accordingly, Redinger was sworn and testified that he drove the car at the time of the offense. It was not disclosed to Redinger at the time that the Court had two contrary sworn statements. He was subsequently charged with perjury and moved to dismiss the indictments. On appeal, the court held that "fundamental fairness" barred the State from charging him with perjury. As the court said,

> " . . . the State should have no part in any kind of trickery. What happened at the hearing . . . smacks of entrapment. • • • This was not fair play" 64 N.J. at 50.

Similarly, the collusion of the Supreme Court and the Deputy Attorney General "smacks of entrapment." Helfant was set up and then coerced into testifying. On the basis of *United States v. Mandujano* and *State v. Redinger,* Helfant suffered and continues to suffer constitutional harm in the due process sense.

Most important, this case comes to this court not after a conviction for false swearing, but only after in-

dictment. No one has proved Helfant lied, and, in fact, the inference can be just as strong that the three convicts lied. There was certainly a motivation to do so. An indictment is only an accusation and is not reflective of guilt or innocence. This procedural aspect and the denial of due process sets apart those cases cited by the State for the proposition that the Fifth Amendment does not protect against perjury. *E.g., Bryson v. United States,* 396 U.S. 64 (1969); *United States v. Knox,* 396 U.S. 77 (1969); *United States v. Kahringer,* 345 U.S. 22 (1952). In each of the cases cited by the State, the defendant had been convicted beyond a reasonable doubt for perjury and sought to overturn the conviction on the ground that the government had illegally exacted the criminal statement. Moreover, in each case, at the time the perjury was committed, the government had a lawful right to exact the information it sought. It was neither engaging in unlawful activity nor prosecutorial misconduct. In the present case both were present.

More on point are those decisions such as *Marchetti v. United States,* 390 U.S. 39 (1968); *Grosso v. United States,* 390 U.S. 62 (1968) and *Haynes v. United States,* 390 U.S. 85 (1968). In these cases, the method by which defendants were caused to incriminate themselves was legally challenged. Here Helfant also seeks to lawfully challenge the method by which the statements were exacted, *prior* to any determination of guilt.

Also involved in the factual complex is the divulgence of raw grand jury data by Deputy Attorney General Hayden. This was in direct violation of the New Jersey Court Rules mandating secrecy for grand jury proceedings[21] and of numerous cases. *See, e.g., State v. Clement,*

---

21. *Rules* 3:6-7, 3:6-8.

40 N.J. 139 (1963); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959); *United States v. McKeaver,* 271 F.2d 669 (2nd Cir. 1959). *Annot.* "Inspection—Grand Jury Minutes" 3 A.L.R. Fed. 29 (1970). While a grand jury is an arm of the court, *In re Jeck,* 26 N.J. Super. 514, 98 A.2d 319 (App. Div. 1953), it is not a tool of either prosecutor or judge. No rule or statute provides for the divulgence of raw grand jury data to the Supreme Court during an on-going investigation, and it may not be used by the court for any purpose. *Compare, Branzburg v. Hayes,* 408 U.S. 664 (1972); *United States v. Bryan,* 339 U.S. 323 (1950); *Blackmer v. United States,* 284 U.S. 421 (1932) (a grand jury itself may not violate a defendant's constitutional rights). To say the Court had control over the Grand Jury and thus had a right to inspect its uncompleted deliberations is like saying a judge may take money *in custodia legis* and go on a vacation with it.

The action of the Deputy Attorney General was plainly misconduct. In New Jersey misconduct by the prosecutor in the grand jury or by the grand jury itself is grounds for dismissal of the indictment. *State v. Grundy,* 136 N.J.L. 96 (Sup. Ct. 1947); *State v. Garrison,* 130 N.J.L. 350 (Sup. Ct. 1943); *State v. Borg,* 9 N.J. Misc. 59, 152 A. 788 (Sup. Ct. 1931); *State v. Donovan,* 129 N.J.L. 470 (1943); *State v. Dayton,* 23 N.J.L. 49 (Sup. Ct. 1850). The attorney general, upon being requested to divulge the grand jury minutes, should have immediately refused. His failure to do so was misconduct.

The deputy's divulgence also violated the sacred doctrine of separation of powers embodied in the Federal and New Jersey Constitution, N.J. Const. Art. III, §1

(1947). This divulgence also serves to illuminate the magnitude of constitutional harm which is alleged in the complaint.

An examination of the complaint reveals much more than an allegation of coercion. It alleges due process violations and a violation of Petitioner's Sixth Amendment right. Moreover, it alleges constitutional harm that has already taken place, not something that is merely threatened. Petitioner has not only attacked the coerced testimony, but alleges that an entire tainted prosecution should be enjoined.[22] He seeks vindication of his civil rights through the only medium that will not only vindicate those rights but also deter future illegal conduct.

It must be emphasized that this is a civil rights case brought under 42 U.S.C. §1983. Under this section it is not necessary to show an improper motive on the part of the person charged, *Bennett v. Gravelle*, 320 F. Supp. 203 (D. Md. 1971). Neither is it necessary that the wrongful acts complained of were done with a specific intent to deprive a person of a federally protected right,

22. Thus, the State's argument that the coercion issue is not justiciable is invalid. This argument assumes future facts; its invalidity lies in its failure to grasp that the constitutional harm has already taken place, which is the taint upon the entire judicial process caused by the collusion of the respondents. The test for justiciabiliy is whether "there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality. . . . " *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Under this formula there can be no doubt that there is a justiciable controversy before this Court. Moreover, abstention is a "judge-made doctrine" *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972) which does not mean "the abdication of federal jurisdiction, but only the postponement of its exercise." *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964). It is usually invoked to allow a state court to pass on an issue of state law. *American Trial Lawyers Ass'n., New Jersey Branch v. New Jersey Supreme Court*, 409 U.S. 467 (1973).

Obviously, the coercion issue is one of federal law properly before this Court. More importantly, the other constitutional claims are of more than sufficient moment to allow jurisdiction of the federal courts. Actually, the real and only question before the Court is whether the district court was in error in dismissing the complaint for failure to state a cause of action.

Baxter v. Birkins, 314 F. Supp. 222 (D. Colo. 1970); nor is it necessary to allege a specific intent in the complaint, *Penn v. Stumpf*, 308 F. Supp. 1238 (N.D. Ca. 1970). Consequently, even if "no malevolent purpose can be imputed" (PK, 39) to the actions of respondents, such a finding would be irrelevant to the question of the validity of the civil rights complaint.

To truly decide the issues before this Court it is imperative that the totality of the complaint be examined. Once it is realized that this is not just a Fifth Amendment case, the magnitude of the allegations becomes crystal clear. Viewed in this light, the harm is at once seen both "irreparable" and "great and immediate."

The bad faith requirement

It has never been conceded, nor is it now conceded, that bad faith was never present in Helfant's prosecution.[23] In fact, bad faith has been alleged from the beginning by the Petitioner. As Paragraph 14 of the verified complaint states, in part:

> "The conclusion must be that the State is engaged in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings under 28 U.S.C.A. §2283" (AK, 71).

It is respectfully submitted that bad faith is present and that the court below erred in foreclosing any fact-finding on this issue.

"Bad faith" is generally signified as a prosecution brought or threatened with no reasonable hope or expectation of obtaining a valid conviction. *See, Perez v.*

---

23. The State's statement is wrong (See PK, 29) as is that in the dissenting opinion below (AK, 24).

Ledesma, 401 U.S. 82, 85 (1971). *Younger* and its companion cases did not create new law, but merely clarified existing law. The opinions make it clear that they were not charting a new path, but adhering to an existing path and disapproving a tendency to stray wrought by *Dombrowski v. Pfister*, 380 U.S. 479 (1965). As the opinions themselves indicated, however, they were by no means the last word on the types of situations that might justify federal intervention. "Other unusual situations calling for federal intervention may also arise, but there is no point in our attempting now to specify what they might be." 401 U.S. at 54. That they were not the last word on what constitutes "bad faith" has been recognized by a number of lower federal courts.

In *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972) the Court enjoined a single state prosecution holding that an injunction may lie against state officials if they either fostered or took part in any alleged misconduct. Significantly, the court equated bad faith with misconduct in a *single* prosecution, saying:

> "When the federal right sought to be protected is the right not to be subjected to a bad faith prosecution or a prosecution brought for purposes of harassment, the right cannot be vindicated by undergoing the prosecution" 467 F.2d at 122, n. 11.

What *Shaw v. Garrison* demonstrates is that an injunction may lie against state officials if these officials either fostered or took part in any alleged misconduct. If bad faith is proven, the individual could not vindicate his rights by a defense to the prosecution even if it was a single state prosecution.

This principle has been impliedly accepted in the Third Circuit in the case of *Lewis v. Kugler*, 446 F.2d

1343 (3rd Cir. 1971). Here, plaintiffs sought in part to enjoin the alleged arbitrary and unreasonable searches of their vehicles by the New Jersey State Police while on New Jersey highways. The Court of Appeals for the Third Circuit affirmed the dismissal of the complaint by the district court as to the pending state criminal prosecutions. The court found that plaintiffs had failed to establish that they were being prosecuted under circumstances establishing the kind of irreparable injury above and beyond that associated with the defense of a single prosecution. The court went on to make the following observation, however:

> "The plaintiffs allege police misconduct, but an injunction against pending state criminal proceedings would operate against the prosecutorial authorities, and there was no allegation that they have either fostered or taken part in any alleged misconduct" 446 F.2d at 1348.

The opinion thus impliedly recognized that an injunction could lie if the prosecutorial authorities did engage in tainted activities. *Cf. Duncan v. Perez*, 445 F.2d 557 (5th Cir. 1971).

In *United States ex rel Birnbaum v. Dolan*, 452 F.2d 1078 (3rd Cir. 1971) it was indicated that a federal suitor could allege bad faith in the *manner* of the prosecution, rather than in the *reasons* for it.

Because there was collusion between the executive and judicial branches; because there was a divulgence of raw grand jury data to the Supreme Court; because the grand jury had been structured by Deputy Attorney General Hayden and the testimony of convicts to indict Helfant; because the Supreme Court knew of this and also knew of Helfant's earlier resort to the Fifth Amendment;

because Helfant was called into chambers, without knowing the reason, ten minutes before a grand jury appearance; because the Supreme Court did discuss the merits of the case with co-defendant Moore; because the court questioned Helfant about his intentions to testify on November 8th, and because the Chief Justice asked as a final question, "What do you intend to do today?" the Petitioner charges that this was a prosecution brought in bad faith. The situation simply reeks of it.

The court below chose to find no bad faith. Petitioner respectfully submits that this was error. He also submits that it was error for the court to limit his relief only to a declaratory judgment. He submits that the court erred in thus restricting the scope of the fact-finding hearing. He therefore petitions this Court to review this finding and ultimately remand for a full hearing on this as well as the other important issues alleged and to reopen the possibility for the issuance of an injunction.

The interlocutory status of the present case

As has been stated numerous times above, this case comes before this Court after a *Rule* 12(b)(6) motion and upon a very, very limited record. It is axiomatic that this Court will not review a non-final judgment. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1969). Of course, if there is a significant issue of law involved, the Court *may* grant *certiorari*. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1948), if the case is presented on a proper record. Here the State in Petition No. 74-80 seeks review after a remand order by the Court of Appeals for the purpose of making a proper record. As such, their petition falls directly within the holding of *Brotherhood of Locomotive Firemen & Enginemen v. Bangor and Aroostook R.R.*, wherein it was said:

> "Petitioners seek *certiorari* to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for writ of certiorari is denied" 389 U.S. at 328.

Under this case, the limited record and the remand renders the issues raised in No. 74-80 unripe for review. In fact, the tactical purpose of the State has been to avoid a complete record, a course of conduct in which it persists. It knows it would not withstand the healthy process of the cross-examination of the parties involved.

Conversely, Petitioner herein submits that the present petition should be granted to allow review of the opinion of the Third Circuit. He submits for the following reasons:

First, a first impression case is being brought before this Court on a record wholly favorable to Petitioner's allegations. There is enough in the record to demonstrate that the Third Circuit Court of Appeals erred in restricting the scope of relief available to Petitioner to a declaratory judgment and narrowing the scope of the fact-finding hearing to the coercion issue only. The question here should be: does the complaint allege a factual situation which might justify relief by way of an injunction?

Secondly, if this case does present "extraordinary circumstances" shouldn't the scope of the hearing encompass all of these circumstances, including possible bad faith?

Lastly, the remand of the Court of Appeals was generally favorable. Consequently, there would be no disruption of the fact-finding if its scope were widened.

Given these factors, the present Petition, unlike No. 74-80, does bring concrete and justiciable issues before this Court. Consequently, the Petition in No. 74-80 should be denied and the present Petition granted.

The effect of *Mitchum v. Foster*, 407 U.S. 225 (1972) upon *Younger v. Harris*, 401 U.S. 37 (1971)

The respondents, in their petition, argue that the "extraordinary circumstances" exception to the *Younger v. Harris* interdiction does not constitute a distinct category supporting federal intervention in a pending State criminal prosecution, in the absence of a showing of "harassment" or "bad faith."

It is most important to remember, first, that the Petitioner herein alleged "bad faith" in his verified complaint, continued to do so through each of the subsequent proceedings, and does so allege in this Petition. Therefore, the statement made in the Petition of the State that: "It is conceded that neither bad faith nor harassment were present in Helfant's prosecution" (PK, 29) is wrong. That sentence was lifted *in toto* from the dissent of Judge Adams (AK, 24). Therefore that Judge and the other two Judges who subscribed to his dissent were also factually incorrect. Any legal opinion to which they subscribed based on this interpretation of this fact must be equally incorrect.

But even assuming, *arguendo*, that no "bad faith" existed in the State prosecution, there need be no showing of either bad faith or harassment in order to allow federal intervention under the Civil Rights Act. The *Younger v. Harris* interdiction came about as the result of a suit under the Civil Rights Act, 42 U.S.C.A. §1983. The later case of *Mitchum v. Foster*, 407 U.S. 225 (1972) was also based on that Act. In *Mitchum*, a prosecuting

attorney sought to close down Mitchum's book store as a public nuisance under Florida law. Relying on 42 U.S.C.A. §1983, Mitchum filed suit in the United States District Court, alleging not that a State law was unconstitutional, but rather that the State laws were being unconstitutionally applied.[24] This Court in a unanimous decision, spoke through Mr. Justice Stewart to the issue of the denial by the District Court of an injunction under 42 U.S.C.A. §1983. It held that the injunctive relief sought was improperly denied by the lower court and, more specifically, that §1983 is an "expressly authorized exception to 28 U.S.C.A. §2283, the Anti-Injunction Statute." 407 U.S. at 242-243.

Mr. Justice Stewart reviewed *Younger v. Harris*, 401 U.S. 37 (1971), its companions and its progeny[25] and discussed the history of the Act which §1983 succeeded in 1948.[26] He concluded that the previous Act was intended to enforce the provisions of the Fourteenth Amendment "against State action . . . whether that action be executive, legislative, or *judicial*," (citing *Ex parte Virginia*, 100 U.S. 339 and supplying his own emphasis). 407 U.S. at 240. And, after reviewing the legislative history of the 1871 Act, Justice Stewart concluded:

> "Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights. The debate was not about whether the predecessor of §1983 extended to actions of state courts, but whether this innovation was necessary or

24. Of course, *Younger v. Harris*, 401 U.S. 37 (1971) conceived the unconstitutionality of a state law, *per se*.

25. These cases included at that time: *Samuels v. Mackell*, 401 U.S. 66; *Boyle v. Landry*, 401 U.S. 77; *Perez v. Ledesma*, 401 U.S. 82; *Dyson v. Stein*, 401 U.S. 200; *Byrne v. Karalexis*, 401 U.S. 216.

26. §1 of the Civil Rights Act of 1871. 17 *Stat.* 13.

> desirable . . . This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; *and it believed that these failings extended to the state courts*" 407 U.S. at 241-42 (emphasis added).

In his dissent below in the Court of Appeals, Judge Adams relied very heavily on his analysis of the term "Our Federalism." He took issue with his brethren in the majority in their interpretation of *Younger v. Harris*. Finding that the majority's exposition of the *Younger* rule was fair, he nevertheless found that the majority holding was not in the "spirit" of *Younger* (AK, 24).

It is respectfully submitted that *Mitchum v. Foster* is at variance with Judge Adams's interpretation of the spirit of *Younger*, and that *Mitchum* truly demonstrates the "spirit" of *Younger*.

Mr. Justice Stetwart's opinion in *Mitchum* very specifically limits that case to the question of the exception of 42 U.S.C.A. §1983 to 28 U.S.C.A. §2283. Yet that opinion is replete with both an analysis of the legislation preceding §1983, the cases concerning that legislation, and with an analysis of the cases concerning §1983 itself, including *Younger* and its companions.[27] From that analysis, Mr. Justice Stewart found that the predecessors to §1983 were adopted by a Congress which "clearly conceived that it was altering the relationships between the States and the Nation with respect to the protection of federally created rights," and he imputed that intent to the Congress which adopted the legislation known as the Civil Rights Act, which included 42 U.S.C.A. §1983.

---

27. See note 25 *supra*.

Thus, where there is a clear denial of the protection of a constitutional right of an individual by the actions of a State, "Our Federalism" must defer to the individual's right to have his constitutional rights protected.

Therefore, *Mitchum v. Foster* clearly allows an exception to the *Younger v. Harris* interdiction, and allows a relaxation of the *Younger* dictates in cases arising under §1983 of the Civil Rights Act.[28]

Concluding statement

As Justice Black recognizes in *Younger v. Harris*, comity is a concept embodying a respect by the federal government for the "legitimate" activities of the State. 401 U.S. at 44. Comity recognizes the need for the national government to protect federal rights. It is not "blind deference to 'States' Rights,'" he writes, but rather a signal to the federal government that its efforts to protect these rights must always be done in ways that will not "unduly interfere" with legitimate state functions.

A state, of course, has a legitimate interest in administering its criminal justice system. Any undue interference with its legitimate administration would tear at the very roots of "Our Federalism." (See PK, 19). When a State, particularly the State Supreme Court, engages in illegitimate activities resulting in the violation of federal rights, comity does not stand in the way of federal protection by the federal government of federal constitutional rights. *Cf. Dombrowski v. Pfister*, 380 U.S. 481 (1965). For, in this situation, the individual is being beseiged by those very State authorities to whom he would first turn for protection; finding them involved in the oppression, he can only turn to the federal government. In this situation, it could

28. 42 U.S.C.A. §1983.

not be said that the national government is "unduly" interfering with any legitimate state activity. Indeed, federal abstention would be that "blind deference" even Justice Black found impermissible.

The situation herein represents an illegitimate exercise of State power. This is not a case where there was a "good faith" attempt to enforce what might be an invalid statute, as was the situation in *Younger* and its companion cases. A *de facto* conspiracy is being alleged between separate branches of government directed toward the subversion of an individual's constitutional rights. Surely, tension could arise by federal interference of state officials in their good faith attempts at enforcement of their criminal law. If the situation warrants, no tension can arise if a federal court steps in to protect the individual, right the wrong and stop illegal state conduct by State officials.

Here, the allegation has been made that the highest court of the State of New Jersey was engaged in an effort to violate the civil and constitutional rights of Petitioner. Here, it is alleged that there was a wholesale failure by the State judiciary and the executive to abide by notions of due process and other constitutional strictures. And here, these allegations have remained unrefuted; in fact, they have now, for the first time, been admitted in a transparent attempt to ameliorate their severity. Under these conditions does the intervention of the federal court detract from the integrity of the State process? Or rather, does it reestablish respect for proper state functions?

The court below concluded that federal intervention herein would serve to strengthen notions of comity and respect (AK, 19). Under the unusual factual complex presented could it be said that this conclusion was wrong? As the court below recognized: "Judges in a free society

regard even the appearance of a biased decision as more harmful than a result they personally disapprove" (AK, 20).[29] This thought has been expressed in our cases, and has become a concommitant of due process.

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' *In re Murchison*, 349 U.S. 133, 136 (1955).

See also, United States v. Raines, 362 U.S. 17 (1960); *Tumey v. Ohio*, 273 U.S. 510 (1927). *James v. New Jersey*, 56 N.J. Super. 213 (App. Div. 1959) (where a municipal magistrate had an opinion of the guilt of defendant in a drunken-driving case because he had seen defendant at police headquarters shortly after the arrest, the magistrate should have immediately disqualified himself. His failure to do so was a violation of due process). By removing the factual determination on the coercion issue from the state-court system, the federal court is negating *any* appearance of possible non-objectivity. In so doing, it will restore to Petitioner his "adequate remedy at law" not presently available. In this respect the opinion of the Court of Appeals is wholly correct.

Petitioner differs, however, with the court below in its conclusion that a declaratory judgment limited to the coercion issue is an adequate remedy. The type of conduct ascribed to respondents in the complaint should *never* occur. *Cf. United States v. Mandujano, supra.* Such governmental overbearance has no place in a free society. To insure against any hint of recurrence, the

29. The court quoted Lord Herschell's remark to Sir George Jessel: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they are getting it" (AK, 20).

product of this overbearance must be suppressed by the most effective deterrent available: *Injunction.* Only by an injunction may the State authorities be put on notice that activities of this kind will never be tolerated and that prosecutions, once tainted, cannot continue on their repressive paths.

Petitioner deserves this full vindication. The impact of the State prosecution upon his life has been devastating. The scurrilous remark in the State's Petition, which is completely *dehors* the record, that repondent "is seen in his old haunts undeterred and unaffected by the grand jury finding of probable cause" (PK, 63) is, and there can be no easier word for it, a lie. It would be inappropriate in this brief to cite illustrations not supported by the record, but it may simply be stated that Petitioner's professional and personal life have been wrecked by the indictment.

The delay cited by the State (PK, 62) has not been caused by the Petitioner. Rather, it was the State that petitioned for a recall of the original mandate of the three-judge panel; it was the State that petitioned for a rehearing *en banc;* it was the State the flooded the court with briefs each time a case was decided that might have been peripherally relevant to the present one; it was the State that petitioned for a recall of the mandate of the *en banc* decision; and it is the State which has initially petitioned this Court for review. In short, the State has done all it can to delay and prevent the public airing of the allegations of the complaint. It has been the State that has used every conceivable procedural device to avoid facing the critical issues. Only now, in its petition has it sought to justify its actions, and this through unscrupulous innuendo and misstatement of fact. It does not deserve to have its petition granted.

CONCLUSION

For all the above reasons, Petitioner prays that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted and that the Petition in No. 74-80 be denied.

Respectfully submitted,

Marvin D. Perskie and
Norman L. Zlotnick
Attorneys for Petitioner
3311 New Jersey Avenue
Wildwood, New Jersey 08260

Patrick T. McGahn, Jr.
Co-Counsel for Petitioner
1421 Atlantic Avenue
Atlantic City, New Jersey 08401

George B. Neidig, Jr.
Of Counsel and
On the Petition

ADDENDUM "A"

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

No. 607-73

Testimony of:
Patrick T. McGahn Jr., and Edwin H. Helfant
Before: Hon. John J. Kitchen, U.S.D.J.
Dated May 9, 1973, Camden, New Jersey

(2) THE COURT: Gentlemen, this is a return day for a motion in the matter of Edwin H. Helfant versus Kugler and others. Gentlemen, what is your intention as far as procedure is concerned? I have read your briefs. I read your affidavits. I don't need those repeated. I will be glad to hear anything in addition to that, that you would care to present; but don't repeat those, please. Who is going to speak for the plaintiff?

MR. PERSKIE: I am Marvin D. Perskie of the firm of Perskie and Callinan, 3311 New Jersey Avenue, Wildwood, New Jersey, will speak for the plaintiff.

THE COURT: All right. You may proceed.

MR. PERSKIE: I am also assisted by co-counsel, Patrick T. McGahn of Atlantic City, who is co-counsel, who is present at counsel table.

THE COURT: You may proceed, Mr. Perskie.

MR. PERSKIE: If the Court please, we are prepared to introduce oral testimony if the Court will entertain it at this time. I have spoken to the Attorney General and he apparently is not prepared to proceed with (3) oral testimony.

THE COURT: All right. You may proceed with whatever you have.

MR. PERSKIE: I would also like the right to reserve argument to respond to the brief of the Deputy Attorney General which I received at 3:15 yesterday, was delivered to me personally in Wildwood.

THE COURT: Mine was received about the same time.

MR. PERSKIE: Mr. McGahn.

PATRICK T. McGAHN, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. PERSKIE:

Q Mr. McGahn, you are a licensed member of the Bar of the State of New Jersey; is that correct?

A Yes, sir.

Q How long have you been a practicing attorney?

A Since 1959.

Q And do you hold any other officer positions in the State of New Jersey?

A Yes, sir. I am District Supervisor for the New Jersey Transfer Inheritance Tax for the County of Atlantic, a position which I held for 16 years.

(4) Q Directing your attention to October 18, 1972, did you at that time represent one Edwin H. Helfant, the plaintiff in this matter?

A Yes, sir.

Q And on October the 18th, 1972, where did your representation take you at that time; where were you?

A Took me to the State House Annex in Trenton, New Jersey in response to a subpoena that was issued to Mr. Helfant to appear before the Statewide Grand Jury.

Q Did you appear with him at that time?

A Yes, sir. I appeared at the State House Annex in Trenton on that date at approximately 9:45 A.M. on the Fourth Floor of that Building.

Q Who was conducting the Grand Jury proceeding to your knowledge at that time?

A The Attorney General's Office.

Q What particular Deputy?

A Joseph Hayden.

Q Do you know Mr. Hayden?

A Yes, sir, I do.

Q And to your knowledge was he conducting the Grand Jury proceedings that were going on?

A Yes, sir, he and other members of the Attorney General's Staff.

Q Now did Mr. Helfant in response to that subpoena (5) voluntarily enter the Grand Jury Room?

A No, sir, he did not.

Q What transpired when you were at that hearing?

A Upon arriving in the morning I informed Mr. Hayden that Mr. Helfant would invoke his Fifth Amendment rights and that he would not testify. I went one step further. I advised Mr. Helfant not to even go into the Grand Jury Room. Conversation continued over that. During the course of the day Mr. Hayden called many other witnesses and at approximately 3:45, he asked me

again whether or not Mr. Helfant would go into the Grand Jury Room. I told him we would invoke the Fifth and that I would not even let Mr. Helfant walk into the Grand Jury Room to invoke the Fifth because I felt under the Sarcone Case, he didn't even have to show himself—viewing himself in front of the witnesses might even prejudice himself as to the Fifth Amendment.

Q Now, was there a Court hearing that transpired over this situation?

A As a result of that, Mr. Hayden, I believe, called Judge Kingfield and set up a hearing at approximately five minutes after four over in the Courthouse in Trenton.

Q Now to conserve time, Mr. McGahn, you have read the complaint in this matter and the attachments thereto, have you not?

A Yes, sir.

(6) Q And attached to the complaint is a transcription of the proceedings before Judge Kingfield?

A Yes, sir.

Q Is that a true and accurate and complete transcription of what went on before Judge Kingfield on that date?

A Yes, sir, it is.

Q Now after the hearing before Judge Kingfield—

A I might add one other thing, Mr. Perskie. Prior to the hearing both Mr. Hayden and I went into Judge Kingfield's Chambers at which time both of us presented our sides of the matter and I asked Judge Kingfield at that time for a delay of the matter so that I could further review the matter as to whether or not the Fifth Amendment went so far as to not have a witness even go into the Grand Jury Room. He said that since we couldn't

agree, Mr. Hayden and I, that we would then go out into open Court and put it all on the record.

Q Now after the hearing terminated, what action did you take next?

A I went back, it was approximately five minutes of five on that date; I went back to the State House Annex and I asked Mr. Hayden if he would accompany me to, I believe, the Supreme Court, Office of the Supreme Court —yes, in fact, it was the Supreme Court. I attempted to call Judge Leonard of the Appellate Division, who is in our area in Atlantic County. I couldn't locate him. I looked at the Lawyers (7) Diary and found that Judge Matthews was the closest one to South Jersey. So, I caught Judge Matthews before he left his Chambers. Mr. Hayden and I both presented our arguments to Judge Matthews over the telephone at which time I requested a stay and it was denied by Judge Matthews. I then attempted to reach Justice Weintraub to no avail and then Mr. Helfant had no alternative at that time but to go in before the Grand Jury and invoke his Fifth Amendment rights. Now Mr. Hayden, prior to Mr. Helfant going in, said that he would ask him certain specific questions and he outlined what those questions were, and Judge Helfant indicated he would take the Fifth Amendment to each of the questions. Judge Helfant then proceeded from the Supreme Court Chambers to around the corner and down the hall to where the Grand Jury was waiting and at approximately 5:15 or 5:30, he went into the Grand Jury Room and emerged about five to ten minutes later.

Q Now was there any conversation that took place in your presence either with you and Mr. Hayden or with Mr. Hayden and Mr. Helfant when you were present after this session with the Grand Jury terminated?

A I am sure there were conversations Mr. Perskie, but I don't know, I can't remember what they were.

Q Now do you know whether or not Mr. Helfant was subsequently subpoenaed to reappear before the Grand Jury?

A Yes, sir, he was.

(8) Q Do you know about when the subpoena was received and for what date it was received?

A I believe that he received the subpoena on the 27th or 28th of October, 1972.

Q Did you personally see the subpoena?

A Yes, sir, I did. Mr. Helfant called me when he received the subpoena and indicated to me that it was served by a Detective Sullivan and I told him at that time that I would call Trenton and attempt to get a rush job on the transcript before Judge Kingfield so that we would have that available when we would go to Trenton again.

MR. PERSKIE: Could I have this marked?

THE COURT: Marked for identification.

(Subpoena was marked P-1 for identification.)

BY MR. PERSKIE:

Q Mr. McGahn, I show you P-1 for identification and ask you if you can identify that document, sir?

A Yes, sir. This is the subpoena that was a copy of which was given to me by Mr. Helfant either on the 28th or 29th of October, I don't recall.

MR. PERSKIE: I offer this for the purpose of hearing if your Honor please.

THE COURT: Any objection, Mr. Laird? There is no dispute that he got the subpoena, (9) is there?

MR. PERSKIE: No, I don't think so.

MR. LAIRD: No.

MR. PERSKIE: I am trying to bring things in that haven't come before you.

(The exhibit just referred to was received and marked P-1 in evidence.)

MR. PERSKIE: With your Honor's permission, may I have this letter marked?

(Letter was received and marked P-2 for identification.)

BY MR. PERSKIE:

Q Mr. McGahn, I show you P-2 for identification and ask if you can recognize and identify that document?

A Yes, sir. This is a letter written by me on October 31, 1972, directed to John F. Callinan, Esquire.

Q Who is John F. Callinan?

A Partner of the firm of Perskie and Callinan of Wildwood, New Jersey.

Q Why was that document sent to him rather than myself?

A Mr. Perskie, if you recall, you were down in Puerto Rico on a short vacation.

Q All right. Now, did you write that letter after consultation with the defendant?

A Yes, I did.

(10) Q And—

A Only that, but after consultation with Mr. Helfant I called Trenton in an attempt to speed up the transcript which I had ordered of the 18th and that explained, I think, the lag of two days between writing the letter to Mr. Callinan and the receipt of the transcript.

Q Now did Mr. Helfant agree on the course of conduct you outlined in that letter?

A Well, yes, Mr. Perskie, he did.

MR. PERSKIE: I'd like to offer this if your Honor please.

MR. LAIRD: May I see it, please.

MR. PERSKIE: This has been previously attached to exhibits that have been filed in this matter.

MR. LAIRD: Yes.

THE COURT: May be marked.

(The letter was received and marked P-2 in evidence.)

BY MR. PERSKIE:

Q Now Mr. McGahn, was there a subsequent appearance of Mr. Helfant before the State Grand Jury after this letter?

A Yes, sir.

Q Do you remember when that took place?

A Yes, sir, it was the 8th of November, 1972.

(11) Q And did you accompany Mr. Helfant to Trenton on that date?

A Yes, Mr. Perskie. In fact, you were with me, along with Mr. Helfant.

Q And do you know from your direct communication with Mr. Helfant what his intention was at that time before he arrived at Trenton with regard to testifying?

A Yes, sir. He was going to take the Fifth Amendment.

MR. LAIRD: May I just have a clarification on that question with regard to testifying as to what?

Q As to anything?

A Yes, sir.

MR. LAIRD: His intention to take the Fifth to anything?

THE WITNESS: Yes, that was what he conveyed to me.

Q Mr. McGahn, what time did you arrive at Trenton on November the 8th?

A We arrived there about 9:20 Mr. Perskie.

Q And what floor was it?

A It was on the fourth floor of the State House Annex.

THE COURT: Aren't we getting too detailed, Mr. Perskie? I know where the Supreme Court is. Can we just get to whatever the meat of the (12) testimony is? Mr. McGahn is testifying to all these details and I don't think they are disputed, are they Mr. Laird?

MR. LAIRD: No, your Honor.

MR. PERSKIE: I want to have a record. I don't want to burden or press the Court.

THE COURT: All right.

BY MR. PERSKIE:

Q Now Mr. McGahn, who did you see in official position when you got to the fourth floor of the Annex?

MR. LAIRD: What does he mean "official position"?

THE COURT: I don't know.

Q I don't mean the janitor. Did you see an Attorney General or did you see—

THE COURT: Wasn't there—and I guess you will get to this—wasn't there a phone call from the Administrative Director?

MR. PERSKIE: I will get to that through the one who directly received it.

Q All right, I will lead you a little. Did you see Deputy Attorney General Hayden?

A I don't believe I saw him immediately upon arriving, but sometime between oh, quarter of nine and 10:30 I did.

Q And was he conducting a session of the Grand Jury on (13) that date?

A There was a Grand Jury sitting, whether or not he was conducting it at that time, I don't know.

Q Now do you know where Mr. Helfant went after he got to the State House?

A Yes, sir, I do. He went to the Clerk of the Supreme Court.

Q And where did he go after that?

A I believe he waited for a few minutes in the Clerk's Office while she made a telephone call and then he proceeded down the hall and into the Chambers of the Su-

preme Court. It is a room that is exactly opposite to where the Grand Jury was sitting at the other end of the hall, at approximately ten minutes of ten.

Q How long was he in that room to your recollection?

A I would say no longer than fifteen minutes.

Q Did you see anybody else go into that room either before or after Mr. Helfant went in?

A Shortly thereafter, Mr. Hayden went into the Supreme Court Chambers.

Q Did you have a conversation with Mr. Helfant when he came out of the Supreme Court Chambers?

A Yes, sir, I did.

Q What was his appearance at that time?

A Well, he was very, very upset. He appeared completely (14) white and he said, I am going to testify.

Q And what did you say to him?

A I said, Eddy, you are crazy. I said, as far as I am concerned, the case against you is very weak and if you go in and testify, they will indict you for perjury or false swearing. I said, your testimony is going to be against three cons and I said, I feel very, very strongly about this; and I said, that as you know, that I have urged you from the very beginning not to testify. Mr. Perskie, I didn't get through to Mr. Helfant.

Q What did he respond if you recall? What did he say?

A He said, it is my ticket, it is my ticket. You are not losing your ticket; and referring to that he meant the right to practice.

Q And did I talk to him too?

A Yes, you did.

Q In the same vein?

A Yes, sir; in fact, even in stronger terms.

Q Now after that conversation where did Mr. Helfant go?

A Mr. Helfant remained, I would say, outside the Grand Jury Room for at least, oh a half hour or so or maybe longer waiting to go in to testify.

Q And did he go in and testify?

A Yes, he did.

Q Did you ever have any conversation with Hayden or did (15) anyone have any conversation in your presence with Hayden that Helfant was going to testify voluntarily on any matter before that Grand Jury before he went into the Supreme Court Chambers?

A No. The only conversation that I can recall that I had with Mr. Hayden was the fact that Mr. Hayden was very careful. He came out and said that Mr. Helfant would testify about three matters and he said that he would give him his Fifth Amendment rights after it—prior to each of the matters. One, I believe, was an ice box, an ice machine, another was a watch and the third one was the Cantoni matter; but he said—Hayden was very specific, and he said, that Helfant could come out and would come out after each item and he was going to handle each item separately.

MR. PERSKIE: I have nothing further, Mr. McGahn. If you want to cross examine.

CROSS EXAMINATION
BY MR. LAIRD:

Q Just a couple questions, Mr. McGahn. You first began to represent Mr. Helfant in this matter about when?

A I would say somewheres, oh, around the 11th or 12th of October.

Q That was after—

A He had been served with the first subpoena, I believe.

Q And he responded to that subpoena on October 18?

(16) A Yes, sir.

Q Now the second subpoena you said he called or you called him—

A No, he called me.

Q Did he indicate what the subpoena was for?

A Testify before the Grand Jury, that was all.

Q Not about any particular matter?

A He mentioned something about Detective Sullivan said something that he was going to grant him immunity or something to that. I don't recall the full conversation on that, Mr. Laird.

Q Now when he arrived, this is for the second time to testify on November 8?

A Yes, sir.

Q When he went into the Grand Jury the first time, what did he testify about?

When he went into the Grand Jury to testify for the first time on that morning?

A Are you talking about the 8th or 18th?

Q The 8th, the second time he appeared?

A Well, it was either the ice machine or the watch, because Mr. Hayden was very clear and he came out and he was, I thought, went overboard so to speak, to inform me that he would separate each of the items and allow Mr. Helfant to come out, that they would separate investigations sort of.

(17) Q Now that matter which is the subject matter of the indictment that's involved here, when did he testify about that incident?

A I know that was the last thing he testified about.

Q And that was approximately how long after he had begun to testify before the Grand Jury?

A I don't know; it might have been just before noon or might have been in the afternoon, I just don't recall that; because there were many other witnesses and I recall and I think, there was another hijacking case or heavy equipment case or something. You were running witnesses.

Q Did he indicate to you that he wished to take the Fifth Amendment as to the stolen watch investigation?

MR. PERSKIE: At what time?

Q At any time?

A I don't recall; I really don't.

Q Did he indicate to you that he wanted to take the Fifth Amendment with respect to the ice machine investigation?

A I don't recall, but I believe that it was his intention to take it to everything but I can't absolutely say concerning those two items, but I definitely know—

MR. LAIRD: Thank you Mr. McGahn, you have answered the question.

THE WITNESS: I'd like to finish.

THE COURT: No, you answered the question.

(18) REDIRECT EXAMINATION
BY MR. PERSKIE:

Q Did you have any other conversation or communication with regard to the defendant with regard to his Fifth Amendment before the appearance before the Supreme Court?

A No, other than—

MR. LAIRD: With respect to what?

MR. PERSKIE: That's what we'd like to know.

Q Did he have any conversation—

MR. LAIRD: With respect to any particular investigation?

Q With regard to any matter being investigated by the State Grand Jury?

A Yes, sir. He said, that I believe, it was Justice Weintraub or Justice Sullivan asked him about the ice machine that was allegedly given to Judge Rauffenbart and also his seating arrangements at his Bar Mitzvah concerning his children.

Q His son's Bar Mitzvah?

A His son's Bar Mitzvah, and that one of the reasons that I was concerned further about cautioning him on the Fifth Amendment especially on the 18th, was the fact that I saw two of the cons there, Kravitz and Schusterman, and there was a third man there that was subsequently identified as (19) Cantoni. I didn't know Cantoni. I wouldn't know him. I was involved in a case with him

but we plead out and I don't recall I ever met Mr. Cantoni.

MR. PERSKIE: That's all I have.

THE COURT: Anything further?

MR. LAIRD: Just to indicate my objection about what is hearsay and to take that into consideration.

THE COURT: Thank you.

MR. PERSKIE: I'd like to call Mr. Helfant now if the Court please.

EDWIN H. HELFANT, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. PERSKIE:

Q Mr. Helfant, where do you reside, sir?

A 15 MacArthur Boulevard, Somers Point, New Jersey.

Q And you are a licensed member of the Bar of the State of New Jersey?

A I am, sir.

Q And you are presently a Municipal Court Judge?

A I am a Municipal Court Judge in two municipalities, but I have taken a voluntary leave of absence from both judgeships.

Q Mr. Helfant, when was the first time you appeared (20) before a State Grand Jury in connection with the matters that we are concerned with today?

A On October the 18th, nineteen hundred and seventy-two.

Q And by what means were you summoned before that Grand Jury?

A I was issued a subpoena by Detective Sullivan.

Q Did you have any conversation with Detective Sullivan or the Attorney General Hayden with regard to your willingness to appear and testify before appearing before the Grand Jury on October the 18th?

A No, sir.

Q Now you heard the testimony of Mr. McGahn with regard to the matter that transpired before the Grand Jury on October the 18th and before Judge Kingfield; are they correct to your knowledge?

A Yes, sir.

Q Did you indicate to anybody on that date that you would appear voluntarily before the State Grand Jury and testify to anything?

A No, sir.

Q Mr. Helfant, when did you receive any notices or subpoenaes from the State of New Jersey in connection with this matter?

A There was another Grand Jury session on October the 25th where Judge Moore and this Abe Schusterman testified; (21) and on the 27th Detective Sullivan appeared at my office in Atlantic City and handed me the subpoena. I said to Detective Sullivan, I have already invoked the Fifth Amendment. What's this about? He said that the State was thinking about giving me immunity but that he wanted to make me a State's witness. I informed him, State's witness to what? And he said, when you get up there they will tell you.

Q Did you tell him at that time that you would voluntarily appear and testify as to anything?

A There were no—

Q Including ice boxes, Bar Mitzvahs, watches?

A There was no discussion whatsoever with Mr. Sullivan other than what are they going to give me immunity for and when you get up there they are going to tell you.

Q Mr. Helfant, directing your attention to November the 6th, were you in your office on that date?

A No, sir.

Q Did you have communication with your office on that date?

A Yes.

Q As a result of your communication with your office on November the 6th, 1972, what did you learn about this case, if anything?

A I had learned the Administrative Director's Office called my office and left a phone number at approximately 3:35 P.M. (22) from the Sheraton Post Motor Inn in Cherry Hill or I think it is Cherry Hill—I put in a call to Mr. McConnell.

Q Did you speak to him directly?

A I spoke to Mr. McConnell.

Q And what was the conversation?

A Mr. McConnell told me the Supreme Court wanted to see me at 9:50 A.M. on Wednesday the eighth, which was two days later, the day in between being Election Day. I said to Mr. McConnell that I have a Grand Jury subpoena for 10:00 A.M. on November the 8th. He said, the Court—he didn't say he was—he said the Court is aware of that and they want you at 9:50 in the Clerk's Office. I said, can you tell me what it is in reference to? And he said, the Supreme Court wants to talk to you.

Q Now you went to Trenton on November the 8th in the company of your two attorneys?

A Both you and Mr. McGahn.

Q What was your intention with regard to appearing and testifying before the State Grand Jury on that date before you arrived at Trenton?

A Well actually I had no intention, Mr. Perskie, because Mr. Sullivan had said something about immunity and I had already invoked the Fifth Amendment and I didn't intend to testify about anything. I asked you in the car what are they going to give me immunity for?

(23) Q When you arrived at Trenton, you went to the Clerk's Office of the Supreme Court, did you not?

A Yes.

Q And you were subsequently ushered into the Supreme Court private Chambers?

A Well, it was scheduled for 9:50 and if you will remember Mr. Perskie, it was raining something awful and the Supreme Court was a little late; and about 9:55 Mrs. Pesco took me from her office to the Supreme Court Chambers or conference room, not the Chambers.

Q Conference Room. Do you know how many Judges were there?

A To my knowledge one judge, I think Justice Proctor was missing, I am not sure, but I think, that Justice Proctor was missing.

Q Were they sitting in their robes?

A Yes, sir, I think they were; yes, sir.

Q Now what happened when you came in?

A I walked in and without any good mornings or anything else, the Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment.

Q Now were they sitting down, the Judges?

A Yes, they were seated.

Q Were you standing or—

A Mr. Perskie, I don't remember if they told me to be (24) seated or if I was standing up.

Q And what was your state of mind and your feelings as you entered those Chambers?

A Well Mr. Perskie, I couldn't understand why they wanted me on such short notice, five minutes or ten minutes before the Grand Jury hearing and I was scared.

Q Now you said the Chief Justice said something to you. Relate the conversation that took place as nearly as you can?

A The Chief Justice asked me if I thought it right for a Judge to invoke the Fifth Amendment? And I said, Mr. Chief, before I can answer that I'd like to explain. He said, I don't want to get into the merits. I just want you to answer the question. And I said, well the answer to your question is no, I don't think it right; but I said, I would like to explain; and he said, no explanation is necessary.

Q Was there any other conversation?

A Mr. Justice Sullivan, who had just been appointed and I recognized him, I never met Justice Sullivan before; asked me if I had sat in the Municipal Court since I had invoked the Fifth Amendment; and I told him I had sat once in Somers Point; and he then asked, do I think it right to sit in judgment of other people when I myself

had invoked the Fifth Amendment and refused to answer certain questions that were posed to me.

Q What did you respond?

(25) A I then tried to tell Justice Sullivan about the three convicts and the reports that I had had of what they were saying and I felt that the only way I could protect myself, and the Chief Justice then said, we do not want to get into the merits; and I was cut off from saying any more. The Chief Justice then began to ask me about an ice maker that I was supposed to have purchased for Judge Rauffenbart and I told him I had purchased one and I had a receipt for it and cancelled check; and he then began to inquire about this fellow Schusterman and was Schusterman at my son's Bar Mitzvah and I tried to explain how he happened to be there, that he supplied the novelties and the favors. The Chief Justice asked me about the seating arrangements for the Bar Mitzvah and then he asked me who had purchased the liquor for the Bar Mitzvah, whether Mrs. Schusterman was there and whether I had purchased any other gifts for Judge Rauffenbart. He asked if formal invitations were sent out. It was basically things pertaining to Abe Schusterman who I had known had testified on the 25th of October, one week before.

Q Now was there any file in the presence of the Chief Justice?

A There was a file in front of the Chief Justice, Mr. Perskie, but it was closed and it was with the same brown folder that was submitted to you by Mr. Hayden in your request with the clasp on the top of it. I don't absolutely (26) recall Mr. Perskie, everything that went on in front of the Supreme Court.

Q How long would you say you were totally, the total time you were before the Court?

A It wasn't longer than ten or twelve minutes, Mr. Perskie.

Q And when you came out—

A Well, there was one other question the Chief asked me and I think it was the tone, when he said, what do you intend to do today?

Q And what did you tell him?

A I said, Mr. Chief Justice, I am going to testify.

Q And why did you make that decision?

A Well Mr. Perskie, the complete aura of the room and the way the questions were posed to me and the manner in which the Chief Justice posed his question to me, frankly, I was scared.

Q Scared of what?

A I didn't know what they were going to do to me because I had known the nature of the witnesses that had testified before this Grand Jury. I had seen the Chief Justice posing questions to me about what the Grand Jury later asked me about. I didn't know whether they were going to take my license away to practice law or suspend me pending a hearing. Quite frankly, I knew that the judgeships would go out the window the minute I intend to invoke the Fifth from Justice (27) Sullivan's conversation to me and I was shook as I am right now.

Q And when you came out of the Supreme Court Chambers were you confronted by your counsel?

A Patty asked me what went on? I said, Pat, I am going to testify.

Q What did your counsel advise you at that time?

A Well Patty at first said I was making a mistake and that he drew an analogy to another case and he said the only thing they can get you in for is false swearing or perjury. They have no case. I said, Pat, it is my ticket and it is my kids and I am going to testify.

Q You were concerned about your livelihood?

A Sure; concerned about it right now.

Q Now Mr. Helfant, did you keep up with the newspaper publicity in this case?

A I sure did.

Q And did you read the papers outside of the Atlantic County jurisdiction?

A Yes, sir.

Q Now was there anything to your knowledge in the newspapers with regard to the questions that Chief Justice Weintraub asked you about, your Bar Mitzvah, the liquor, the favors, the seating arrangements?

A None to my knowledge. In fact, I know there wasn't.

(28) Q When did you first read about any of these items in the newspaper?

A On December the 7th, approximately a month after my Grand Jury appearance.

MR. PERSKIE: With the Court's permission, may I have this marked?

THE COURT: Yes, you may have it marked.

(Newspaper article was marked P-3 for identification.)

Q I show you P-3 for identification and ask you if this is the newspaper article where you first saw these items I have referred to?

A This is the beginning. This is the first in the beginning of a few other articles, but this is the first time that it appeared in a newspaper to my knowledge.

Q And the date of that newspaper is what?

A December 7, 1972.

Q And what newspaper is that?

A The Press, published in Atlantic County.

MR. PERSKIE: I offer this if the Court please.

THE COURT: May be marked.

(Newspaper article was received and marked Exhibit P-3 in evidence.)

MR. PERSKIE: That's all I have.

(29) CROSS EXAMINATION
BY MR. LAIRD:

Q Mr. Helfant, how long have you been a lawyer in the State of New Jersey?

A Since nineteen hundred and fifty-three.

Q And how long have you been a Municipal Judge?

A I was appointed in Somers Point, New Jersey in April of nineteen hundred and sixty and served there up until 1969, when I was not reappointed; then reappointed again in June of '72 and I have been serving up until the leave of absence in Galloway Township, New Jersey from —don't hold me to the date Mr. Laird, but—I mean the month, but it is 1966 up until the present time.

Q Now when you appeared on October 18, you refused initially to go into the Grand Jury; is that correct?

A On advice of Mr. McGahn after he had seen Cantoni, Kravitz and Schusterman, he said, I don't even want you to go into the Grand Jury Room.

Q Did you then attend a hearing before Judge Kingfield?

A Yes, I did.

Q That hearing was in open Court, was it not?

A Well, there was some conversation in Chambers Mr. Laird, between Mr. Hayden and Mr. McGahn while I was in the Corridor; then it was in open Court.

Q There was a hearing in open Court?

(30) A Yes.

Q After that you returned into the Grand Jury; is that correct?

A Well, yes, we returned. We couldn't get a cab, we ran back.

Q And did you then go into the Grand Jury?

A Yes.

Q Now after that testimony, did you not have a conversation with Mr. Hayden with respect to the case involving an ice machine?

A No, sir. I had another conversation with Mr. Hayden.

Q Did you have a conversation with respect to Judge Rauffenbart?

A No, sir. I had a conversation with Mr. Hayden about why don't I cooperate with him and give him somebody in Atlantic County.

Q Did you have any discussion with him about a stolen watch?

A No, sir.

Q Now when you returned November 8th, I believe when you appeared before the Supreme Court?

A Yes, sir.

Q Now at any time did any member of the Supreme Court threaten to move against you to remove your license?

A Absolutely not.

(31) Q Did they threaten at all to remove you as a Municipal Judge?

A No, sir, not verbal threats; no, sir.

Q It is a fact, is it not, that at least approximately three weeks prior thereto you had indeed taken the Fifth Amendment before the Grand Jury?

A Yes, sir.

Q And there had been no action taken against you, had there, as a lawyer or Municipal Judge?

A No, sir; that's what upset—

Q Excuse me.

A That's what upset me. They would call 3:30 on a Monday afternoon and tell me to be there without notice, without any reason and tell me to be there at 9:50 in the morning when I had a Grand Jury appearance and I was nervous enough about that.

Q Did they indicate what the consequences of your—

A They didn't discuss anything with me Mr. Laird, other than what are my intentions and do I think it right.

Q Did Mr. Hayden threaten to take any action against you to have your license removed?

A Mr. Hayden didn't threaten in that manner. Mr. Hayden said if I didn't cooperate—

Q Just answer the question.

A About the Supreme Court?

(32) Q No, did Mr. Hayden threaten to take any action against you to have your license removed as a lawyer; yes or no?

A Not to take it away from me, no.

Q Did he threaten to take any action to remove you as a Municipal Judge?

A No.

Q Did he at all times advise you of your rights before you testified?

A In the Grand Jury Room, yes.

Q Now you stated today that the Chief Justice said at the conclusion, I believe, of your little meeting with them, "What do you intend to do today?" Now is it not a fact Mr. Helfant that you filed affidavits in this particular case over two months ago?

A I filed some affidavits, yes, sir.

Q And did you not in that affidavit discuss what went on in the Supreme Court Chambers?

A Somewhat, yes.

Q And did you ever say that the Chief Justice had said, "What do you intend to do today?"

A The Chief Justice didn't—

Q Could you just answer the question?

A No, I didn't say that at all.

Q All right. Thank you. Mr. Hayden and Mr. Sullivan filed affidavits in this case as you know, almost two months (33) ago and in that affidavit of Mr. Hayden, he indicated that you did have a discussion with him after your taking the Fifth Amendment on October 18?

MR. PERSKIE: If the Court please, I would object to Mr. Hayden's affidavit. Mr. Hayden is a party defendant in this matter. He hasn't appeared. We tried to get him to state in Court on innumerable occasions what his position was and he has refused to do so. He's claimed a privilege; he's claimed a certain right of interdepartmental—

THE COURT: Affidavits are on record. How can I disregard them?

MR. PERSKIE: Because I think the man should be here subject to cross examination.

MR. LAIRD: That's his opinion and the affidavits have inded been on record and I am cross examining this witness.

THE COURT: You may proceed, Mr. Laird.

BY MR. LAIRD:

Q Now I will return to it. Those affidavits by Mr. Hayden and Mr. Sullivan were, in fact, submitted over two months ago. In the affidavit of Mr. Hayden he states and I can quote it to you—let me get it right—excuse me just a minute, your Honor.

(34) THE COURT: All right.

Q Paragraph three of the affidavit he states, "That upon leaving the Grand Jury around 5:30 or 6:00 P.M.,

Detective Sullivan and I spoke briefly to Helfant. Helfant was then informed that the State Grand Jury was also investigating his connection with an ice machine, which was procured by Abe Schusterman with a bad check and ultimately given to Judge Thomas Rauffenbart and Helfant expressed a desire to testify about this matter."

Now Mr. Helfant, that was on record for almost two months before you took any issue with that statement. Is it your testimony now that you directly refute that statement?

A Absolutely. There is not such conversation. It was the conversation I related to.

Q Thank you. Is it not a fact that you did not respond in your affidavit for at least two months to that particular statement?

A I don't know whether Mr. Perskie responded or not to that affidavit.

Q Well, it is your affidavit, is it not?

A My affidavit attached to this proceeding.

Q Anywhere in the proceeding did an affidavit in this proceeding respond to that statement within those two months?

A I don't know.

Q Thank you. You stated that you were very concerned (35) about your livelihood and whether you might lose your license to practice and whether you might be removed as a Municipal Judge, when you appeared before the Supreme Court Chambers. Were you not equally concerned three weeks earlier when you went into open Court and it became a matter of public record that you indeed took the Fifth Amendment, a lawyer and a judge took the Fifth Amendment before the Grand Jury?

A Of course I was concerned Mr. Laird; but I was acting on advice of Mr. McGahn after we saw the nature of the State's witnesses, the caliber of the State's witnesses.

Q And Mr. McGahn's advice to you after your appearance before the Grand Jury was not to testify, was it not?

A On the 18th?

Q On the 8th?

A After I left the Supreme Court?

Q After you left the Supreme Court?

A No one in this world could have made me take the Fifth.

Q You did not act on his advice?

A No, sir.

REDIRECT EXAMINATION
BY MR. PERSKIE:

Q Was any counsel with you or invited in with you to the Supreme Court Chambers?

(36) A No, sir.

Q Did you put your entire conversation with the Supreme Court in the prior affidavits filed in this matter?

A Mr. Perskie, if you recall, I made you rewrite that affidavit four or five times, because I was very reluctant to file any affidavit about any proceeding with the Supreme Court, because I was then, as I am now, concerned about my confrontation with the Supreme Court.

MR. PERSKIE: That's all I have.

THE COURT: I'd like to ask one question of Mr. Helfant if I may. I want to ask you about the affidavit which you have filed and I want to ask you whether or not this statement was in it if you can recall, and this I am quoting from the context of the papers on file. "I cannot say that the Supreme Court in any way directed me to testify, nor did they in any way indicate to me what the consequences would be if I continued to stand by the Fifth Amendment."

THE WITNESS: Yes, sir.

THE COURT: That is your statement?

THE WITNESS: Yes, sir.

THE COURT: Thank you, sir. You may step down.

(37) MR. PERSKIE: If your Honor please, with all due respect to the Court, that is taken out of context and I'd like to have the balance of the paragraph read into the record.

THE COURT: All right, you can read it.

MR. PERSKIE: This is the balance of the paragraph, is it not Mr. Helfant? "However, from the very fact that I was summoned there, and from the comments of the Chief Justice and Mr. Justice Sullivan, I was concerned that in the event I concluded I should not testify, the Supreme Court might have taken some action against me because of my refusal." That is the balance of your sentence?

THE WITNESS: Yes, sir.

THE COURT: That was your assumption?

THE WITNESS: Yes, sir, because—

THE COURT: Nothing was said by the Court that that would happen?

THE WITNESS: No, sir; but I imagined from the fact that they did not discuss anything else with me except the questions that were later posed to me at the Grand Jury, and frankly, the Chief Justice's tone to me, I decided I was going to testify.

(38) THE COURT: Thank you very much.

THE WITNESS: Your Honor, there is no question pending, but may I say something to the Court?

THE COURT: No. It is very unusual even from a lawyer. You have a counsel here representing you.

THE WITNESS: May I be excused for one second to discuss something with counsel and resume the stand?

THE COURT: All right.

(Discussion off the record.)

THE WITNESS: I have nothing further, your Honor.

THE COURT: All right gentlemen, thank you.

(Mr. Perskie argued on behalf of the plaintiff.)

(Mr. Laird argued on behalf of the defendants.)

• • •

CERTIFICATE

I, DOROTHY C. BOSS, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate transcript of the testimony and proceedings had before me.

/s/ Dorothy C. Boss
DOROTHY C. BOSS, C.S.R.

Dated: May 10, 1973

ADDENDUM "B"

UNITED STATES DISTRICT COURT

District of New Jersey

Oral Opinion — No. 607-73
Before: Hon. John J. Kitchen, U.S.D.J.
Dated May 9, 1973, Camden, New Jersey

(2) THE COURT: Gentlemen, after considering the briefs and the affidavits submitted by the parties, and the oral arguments of counsel and testimony, this Court has determined that the plaintiff's petition to preliminarily enjoin the pending State Criminal Prosecution against him should be and is hereby denied.

Although this Court has jurisdiction in a suit brought under the 1938 Section to issue an injunction against a State Criminal Proceeding under the recent case of Mitchum, but in my opinion the plaintiff has failed to establish that federal intervention here is permissible under the guidelines of Younger versus Harris.

Younger and its companion cases set out a narrow exception to the broad and well settled policy that Federal Equity Courts should not intervene into pending State Criminal Proceedings.

They set out, in order for the federal intervention to be proper, Younger holds that the plaintiff must establish that the State Prosecution was brought in bad faith in order to harass the defendant. Second: That the irreparable harm to the defendant must be both great and immediate and must be more than those (3) injuries that are usually incidental to every criminal proceeding. Third: That the threat to the plaintiff's federally protected rights

must be one that cannot be eliminated by his defense against a single criminal prosecution.

Although this case does not present a challenge to the constitutionality of a State Statute, Younger does apply since the focus of Younger on intervening in pending State Criminal Proceedings which is exactly the relief sought here.

Applying the above guidelines of Younger to the facts of this case, the Court finds that the allegations by the plaintiff do not establish that the prosecution was initiated in bad faith for the purpose of harassing the plaintiff, nor for the alleged purpose of coercing the plaintiff to involuntarily relinquish his Fifth Amendment rights against self incrimination in order to obtain indictments against him for false swearing. From the record before this Court, it appears that the prosecution of the plaintiff grew out of an on-going State Grand Jury Investigation into alleged acts of misconduct that had been initiated prior to the (4) incidents alleged by the plaintiff.

The plaintiff has failed to establish irreparable harm which is both great and immediate. The only harm alleged by the plaintiff is that harm incidental to the defense of a criminal prosecution. The defense of a criminal charge based on an indictment that is alleged to be constitutionally defective does not amount to that degree of harm required as one of the prerequisites to Federal Injunctive Relief.

The plaintiff's defense to the state criminal charge against him does afford him an adequate method to seek vindication of his constitutional rights. For this Court to hold otherwise, this Court would have to assume that the State Trial and Appellate Courts would not review plaintiff's contention impartially and fairly; an assumption which this Court is not willing to make.

In addition, the defendant's motion to dismiss the complaint for lack of jurisdiction is also denied, however, because the only relief requested in the complaint is injunctive, the defendant's motion to dismiss for failure to (5) state a claim is hereby granted.

You may prepare the order Mr. Laird.

MR. PERSKIE: Could we obtain a temporary restraint pending the making of appeal to the Circuit Court?

THE COURT: No, I won't do that Mr. Perskie.

All right. Court's adjourned.

• • •

CERTIFICATION

I, DOROTHY C. BOSS, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify the foregoing to be a true and accurate partial transcript of the testimony and proceedings had in the above entitled cause.

/s/ Dorothy C. Boss
DOROTHY C. BOSS, C.S.R.

Dated: May 9, 1973

ADDENDUM "C"

Letter Dated October 31, 1972 to John F. Callinan from Patrick T. McGahn, Jr.

John F. Callinan, Esq.
3311 New Jersey Avenue
Wildwood, New Jersey

Re: In the Matter of Edwin Helfant
Our File No. 2751

Dear John:

In the absence of Marvin, I want to tell you that Ed Helfant has been subpoenaed once again before the New Jersey State-wide Grand Jury on November 8th. It is his intention to take the Fifth Amendment.

As you know, we were up there once before and I enclose herewith a copy of that transcript in which he was compelled to go before the Grand Jury and take the Fifth. My position was that he should not have to go before the Grand Jury when he is the target of the investigation. I am having Jerry Gross check the law on the subject and I would like you to do likewise. A starting point, I believe, is State v. C. Robert Sarcone, 93 N.J. super 501.

I would appreciate it likewise if you would have one of your fellows prepare a memorandum on this subject because time is of the essence and no doubt, we will wind up again before Judge Kingfield.

Yours cordially,

/s/ Patrick T. McGahn, Jr.
For McGAHN & FRISS

ADDENDUM "D"

Affidavit of Samuel Moore

STATE OF NEW JERSEY:

ss:

COUNTY OF ATLANTIC:

SAMUEL MOORE, of full age, duly sworn upon my oath according to law, depose and say:

1. Some time in August of 1972, while in my office at 533 Guarantee Trust Building, Atlantic City, New Jersey, I received a visit from William P. Sullivan, of the New Jersey State Police. He said, "This investigation does not concern you, this concerns Helfant." A brief discussion ensued concerning the Cantoni case, then he left.

2. About a week later, Detective Sullivan returned to my office and gave me a subpoena for the following Wednesday to appear before the State Grand Jury in Trenton. The following Wednesday I went to Trenton at the scheduled time of 1:00 P.M., and sat in the corridor until 5:00 P.M., and the Grand Jury was excused without my ever having been called before them. Detective Sullivan then called me into a room adjoining the Grand Jury room, and I met Deputy Attorney General Hayden for the first time. There were three other people in the room, whose identities were unknown to me.

3. Hayden then asked me what I knew about Helfant's involvement in the Cantoni matter. I replied I did not know anything about the Cantoni matter. Hayden then requested me to tell him anything I knew about Helfant. I told him I knew nothing about Helfant of my own knowledge. I was excused after three-quarters of an hour,

without ever having been before the Grand Jury, even though my subpoena was to appear before the Grand Jury.

4. I was subsequently served with another subpoena to appear before the Grand Jury by Detective Sullivan, and proceeded to Trenton on the following Wednesday, and arrived at the designated time, which I think was 11:00 A.M. I waited in the corridor for over five hours, without ever being called before the Grand Jury on this occasion. The Grand Jury was dismissed, and Sullivan once again requested I come into the anteroom. I am sure that the same unidentified people were there with Mr. Hayden. Hayden once again began to question me about Helfant, and what I could tell him about Helfant. I told Mr. Hayden what I told him on the previous occasion, that I knew nothing about Helfant. I asked him if he wanted me to lie and make up some stories about Helfant, and he said, "No, we just want to know about Helfant," and he went into the Cantoni matter again. Mr. Hayden refused to believe anything I said, and I said to him, "You don't want to believe me—you would rather take the word of a drug pusher who is in State Prison." I was once again dismissed without ever being brought before the Grand Jury.

5. I received a third subpoena from Detective Sullivan, and I told him I had a vacation planned, and would not appear the following Wednesday, as I was leaving for a vacation on Monday. Due to my failure to appear, a warrant had been issued for my arrest, and upon my return I had to appear in Trenton on October 25, 1972 before Superior Court Judge Kingfield. While sitting in Judge Kingfield's waiting room for one-half hour with my attorney, L. Milton Freed, of Atlantic City, Deputy Attorney General Hayden and Detective Sullivan came out of Judge Kingfield's chambers just before Judge Kingfield came out to ascend the bench. They were in there at least one-half

hour, as I was sitting there for that period of time. My attorney asked if this matter could be heard in chambers, and Hayden insisted that it be heard in open Court. Judge Kingfield then ascended the bench, and Mr. Hayden requested that I be incarcerated. The Judge then sentenced me to one day in jail and fined me $100.00. My attorney informed the Court that I was to appear in front of the Grand Jury. Judge Kingfield then released me in the custody of my attorney for the purpose of appearing before the Grand Jury. I testified in front of the Grand Jury and then Detective Sullivan took me to the Mercer County Jail, where I was confined until 4:00 P.M.

6. On November 6, 1972, I received a call from the Administrative Director of the Courts, who told me that the Supreme Court wanted to see me at 9:50 A.M. on November 8th. I proceeded to Trenton and arrived there late due to the inclement weather, and went right before the Supreme Court in chambers. The first question from Chief Justice Weintraub was whether I had called Detective Sullivan a "prick." This was a question that was asked in the Grand Jury session of October 25th. I had brought my file with me and had all the papers in front of me, not knowing what the Supreme Court was going to ask, as Mr. McConnell did not tell me what the Supreme Court wanted, but I assumed it was about the Cantoni matter. The Chief Justice then asked if I had a copy of the Cantoni Complaint with me, and when I told him I did, he asked me if he could have same. Helfant's signature was discussed.

7. Then there was some discussion about the $1500.00 check which had been located in Feinberg's office, and the Chief asked me what kind of office Feinberg had, and I told him it had a fine reputation. I then stated to the Chief Justice that Sullivan should have told me he found

the $1500.00 check in Feinberg's office, and the Chief said Sullivan is under no obligation to tell me anything about an official investigation. I was then excused by the Court.

/s/ Samuel Moore
SAMUEL MOORE

NOTARIZED

ADDENDUM "E"

Opinion in United States v. Mandujano

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

TUTTLE, Circuit Judge:

On May 2, 1973, appellee Mandujano appeared as a witness before the DALE (Drug Abuse Law Enforcement) Grand Jury, pursuant to a subpoena. The following warnings were given Mandujano:

"Q Now you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?

A Do I answer all the questions you ask?

Q You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?

A Yes, sir.

Q You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully. in other words, if you lie about certain questions, you could possibly be charged with perjury?"

Mandujano was further advised that he could have an attorney outside the grand jury room; however, he was not told that he had a right to have appointed counsel outside the grand jury room, that what he said could be

used against him in later proceedings, and that he had a right to remain silent.[1]

A federal narcotics agent had reported that in March, 1973, he offered Mandujano money for the purchase of heroin and gave him $650 for the attempted purchase. The government attorney who questioned Mandujano before the grand jury testified at the motion to suppress that he had discussed with the agent the circumstances of this attempted buy in preparation for Mandujano's appearance before the grand jury. Evidence taken on the motion to suppress also showed that the government attorney requested suggestions for witnesses to be subpoenaed before the grand jury from the agent who had dealt with Mandujano and the agent recommended calling Mandujano and then reported to the attorney how the actual attempt had occurred.

Mandujano was asked the following questions, inter alia, by the government attorney before the grand jury:

---

1. Actually Mandujano told the government attorney that he didn't have the money to get a lawyer. The following conversation transpired between them:

"Q Have you discussed your presence here with anybody?

A My wife.

Q Have you contacted a lawyer in this matter?

A No, sir, I haven't.

Q I take that to mean that that you do not wish the services of a lawyer here today?

A I don't have one. I don't have the money to get one.

Q Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

A Yes, sir.

Q Is that clear?

A (Nod affirmative)."

At no time was Mandujano told that an attorney would be furnished him free of charge if he were financially unable to employ one.

Q Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have you tried to get heroin for them in order to sell to them?

A No, sir.

Q Are you sure of that?

A Yes, sir.

Q In other words, no one has ever come up to you and wanted to buy heroin?

A No, sir.

Q And you have never told anybody that you would try to get heroin to sell to them?

A No, sir.

Q Now, you can say here today that you have not discussed the sale of heroin with anybody in the last year?

A I don't understand you, sir.

Q Have you talked to anybody about selling heroin to them during the last year?

A No, sir.

Q Are you sure about that?

A I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.

Q Has anyone ever asked you if they could buy an ounce of heroin or more from you?

A No, sir.

Q Let me ask you once again Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?

A No, sir.

Q No one has ever given you any money—

A No.

Q —to go buy them heroin?

A No, sir.

Q In other words, if you had $650 right now—

A Yes, sir.

Q —Do you think you would be able to purchase an ounce of heroin? . . ."

This interrogation tracked the exact facts of the actual contact between the federal narcotics agent and Mandujano.

The appellee was subsequently indicted in count 1 under 21 U.S.C.A. § 846 for attempt to distribute one ounce of heroin on or about the 29th of March, 1973, and in count 2 under 18 U.S.C.A. § 1623 for making false representations. The perjury count was based on Mandujano's denial before the grand jury of any attempt to obtain or sell heroin or any solicitation to do so.

The district court granted appellee's motion to suppress his testimony before the grand jury, finding that appellee was a virtual or putative defendant in custody under the Miranda[2] decision, and therefore should have been given all Miranda warnings. United States v. Mandujano, 365 F. Supp. 155 (W.D. Tex. 1973). The district court determined that the warnings given were inadequate and that appellee could not be deemed to have voluntarily waived his Fifth Amendment right to remain silent. Appellee was convicted under count 1 for attempt to distribute heroin, without use of his grand jury testimony.

2. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1965).

I. "PUTATIVE OR VIRTUAL" DEFENDANT

[1] Given the nature of the investigation and the questions tendered by the government attorney, the district court held, and this Court agrees, that full Miranda warnings should have been accorded Mandujano who was in the position of a virtual or putative defendant. The district court aptly portrayed the circumstances warranting the fact finding that Mandujano was a virtual or putative defendant during his appearance before the grand jury:

"The government maintains that neither case was considered for presentation to the grand jury prior to the testimony of the defendants before that body, and that both files had been closed following the contact between the defendants and the law enforcement officers; nevertheless, the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecutions. The special attorney who had conducted the questioning testified that he was well aware of the previous contact with the defendants in attempts to buy from them, as well as the exact circumstances involved in each attempted buy. The transcript of the grand jury proceedings reveals deliberate and careful attention to questions which specifically delved into the facts concerning these contacts between the defendant and government agents. The special attorney was aware that no case had been made, and though this Court does not presume any improper motives on the part of the government agents or the special attorney, it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants. The government had in fact already attempted to make a case against each defendant. Note too that each defendant, immediately after denying any contact about an attempted sale, was asked in the very next question about the validity of that answer . . . Considering the totality of the circumstances

in this case, the questioning of the defendants before the grand jury smacks of entrapment. Moreover, given the fact that the investigatory files involving the attempts to buy from both defendants had been closed, the questions posed presented a high likelihood that the answers provided by the defendants would furnish material for further action on the part of the government. If the defendants admitted that they had offer to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. See United States v. Leighton, 265 F. Supp. 27 (S.D.N.Y. 1967), cert. denied, 390 U.S. 1025, 88 S.Ct. 1412, 20 L.Ed.2d 282 (1968); United States v. Montos, 421 F.2d 215 (5th Cir.), cert. denied, 397 U.S. 1022, 90 S.Ct. 1262, 25 L.Ed.2d 532 (1970). The denial by defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them." United States v. Mandujano, 365 F. Supp. at 158-159 (W.D. Tex. 1973).[3]

We construe the foregoing statements by the trial court to be findings that the government had focused upon Mandujano as someone whom the government had knowledge of having committed a crime, as a person whom the government had planned to indict as it had one eye on prosecution, and against whom it was gathering incriminating evidence. Also the discussion indicates that the trial court found that when Mandujano was brought into the grand jury room, the government then knew that an

3. The reference to "defendants" is made in the plural because the district court issued a joint opinion for this case and United States v. Rangel, 365 F. Supp .155 (W.D. Tex. 1973), because it found that the two cases, though not consolidated and not involving the same transaction, embodied a virtually idential set of circumstances.

affirmative answer to questions put to him would amount to a confession of guilt of trafficking in heroin.

Although this Court has recently pretermitttd the question of the scope of Miranda in the context of a putative defendant before a grand jury investigation, United States v. Morado, 454 F.2d 167 (5th Cir. 1972) and Mattox v. Carson, 424 F.2d 202 (5th Cir. 1970), cert. denied, 400 U.S. 822, 91 S.Ct. 43, 27 L.Ed. 2d 51 (1971), we have recognized that as a general rule a grand jury witness is not entitled to warnings of his right to appointed counsel and his right to remain silent.[4] The Court of Appeals for the Sixth Circuit, however, has carved out the exception that when a person ceases to be merely a witness in a general investigation and becomes placed "virtually in the position of a defendant," then the full panoply of rights under Miranda due a person in custody must be afforded. See United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967); United States v. Fruchtman, 282 F. Supp. 534 (N.D. Ohio 1968), cert. denied, 400 U.S. 849, 91 S. Ct. 39, 27 L.Ed.2d 86 (1970); Stanley v. United States, 245 F.2d 427 (6th Cir. 1957).[5]

In United States v. Morado, supra at 173, we have already recognized the force of the argument that if an investigation has passed beyond the stage of a general inquiry and has focused upon the defendant, then the defendant would be in the position of a virtual defendant:

---

4. Morado, supra, at 173. Robinson v. United States, 401 F.2d 248 (9th Cir. 1968); United States v. DiMichele, 375 F.2d 959 (3rd Cir. 1967); United States v. Winter, 348 F.2d 204 (2d Cir. 1965); United States v. Parker, 244 F.2d 943 (7th Cir. 1957); United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955).

5. In United States v. Fruchtman, supra, in circumstances similar to the instant case, the court found the witness to be a virtual defendant. There the government attorney submitted an affidavit denying that the witness was a potential defendant at the time of questioning; yet, the court noted that this attorney had also read investigative reports detailing the circumstances about which the witness was questioned before the grand jury. These facts are similar to those here, where the special government attorney read the narcotics agent's report prior to the grand jury session.

"Without intimating whether this circuit will agree with this 'virtual defendant' perspective, we note that its emphasis is upon the same factor we have considered to be of prime importance in determining whether or not a man is 'in custory' as that term is used in Miranda: 'has the focus of the investigation centered upon him?' United States v. Phelps, 443 F.2d 246 (5th Cir. 1971); United States v. Akin, 435 F.2d 1011 (5th Cir. 1970); United States v. Montos, 421 F.2d 215 (5th Cir. 1970); Bendelow v. United States, 418 F.2d 42 (5th Cir. 1969); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968). If the investigation in the case at bar had passed beyond the stage of being a general inquiry into an unsolved crime of a suspected conspiracy, and had focused upon Solis as a defendant whom the government planned to indict and against whom it was gathering incriminating evidence, we would face the necessity of embracing or rejecting this rule."

The language in Morado is particularly applicable in the case at bar because this investigation clearly had passed beyond the stage of general inquiry into an unsolved crime, and had focused upon the defendant as someone whom the government had planned to indict as it had one eye on prosecution, against whom it was gathering incriminating evidence, and against whom indictments were actually returned.[6] The fact that the questioning attorney

6. This Court in Brown v. Beto, 468 F.2d 1284, 1286 (5th Cir. 1972), discussed at length the application of Miranda, stating: "Before law enforcement officers can subject a ciitizen to custodial interrogation, he must first have been given the Miranda warnings. In Miranda 'custodial interrogation' was defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [4] This court has yet to formulate a general rule for distinguishing custodial from non-custodial interrogation but instead has preferred to take a case-by-case approach.[5] . . . In making the distinction between custodial and non-custodial interrogation this court has singled out certain criteria as having special significance; these include probable cause to arrest, subjective intent of the police, subjective belief of the defend-

immediately pounced upon Mandujano's denial that he had been contacted about the sale of heroin, indicated a clear and direct focus upon Mandujano as a future defendant. Moreover, the government attorney even mentioned the precise figure—$650—which had purportedly been given to Mandujano by the federal narcotics agent, plainly demonstrating that the previous transaction was clearly in the attorney's mind.

Also there was no basis for the perjury count of the indictment until after Mandujano's grand jury appearance. When the government attorney, aware of the alleged prior transaction, asked Mandujano about any previous heroin solicitation or sale, he knew that any truthful answer by Mandujano would be incriminating and therefore protected by the Fifth Amendment which Mandujano was entitled to plead. Thus, if the attorney proceeded to question actually anticipating an answer, he must have known that the response would require Mandujano to confess to a crime or commit perjury. The likelihood of Mandujano confessing a crime before the grand jury was certainly de minimis. The inference is easily drawn that the attorney's questioning was primarily baiting Mandujano to commit perjury. As perceived by the district court this case "smacks" of entrapping Mandujano to incriminate himself or commit perjury. His only "safe harbor" was to remain silent—a right of which the government failed to inform him.

The government asserts that since Mandujano negotiated for a heroin sale with the federal narcotics agent which did not result in a distribution due to appellee's being unable to procure heroin from his sources, therefore the government agents concluded that appellee must have

ant, and focus of the investigation.[7] Although none of these factors is alone determinative, we have recently indicated that the most compelling is whether or not the focus of the investigation has finally centered on the defendant.[8]"

had knowledge of a source for heroin. Consequently he was called before the grand jury only to obtain intelligence regarding known heroin sources, consistent with the purposes of the grand jury, and not in an attempt to obtain incriminating or perjurous statements from him. Nevertheless, as concluded by the district court, "the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecution." Moreover, the questions tendered by the government attorney simply could have inquired whether Mandujano knew any heroin dealers rather than focusing on whether anyone had ever solicited heroin from him.

Moreover, the warnings that were given were not adequate advisement even of the appellee's Fifth Amendment rights against self-incrimination. As pointed out by the trial court, the questioning attorney "stressed not the right to remain silent, but the requirement that the defendant answer all he questions put to him, with limited exceptions. He did not stress the alternative of the defendant remaining silent in the face of a potentially [here certainly] damaging question."

Under the circumstances of this case, this Court agrees that Mandujano was a putative defendant in custody and was entitled to Miranda warnings.

II. REMEDY FOR FAILURE TO GIVE MIRANDA WARNINGS

The more difficult issue here is whether the usual remedy for failure to give constitutional warnings, i.e., suppression of the testimony, can ever be employed in a situation where the testimony itself amounted to perjury.

Appellant relies heavily on United States v. Orta, 253 F.2d 312 (5th Cir. 1958), to convince us that "[u]nder no

circumstances" can a grand jury "witness" commit perjury and then successfully claim that the Constitution affords him protection from prosecution for that crime. Witness Orta was charged with having committed perjury at a grand jury investigation. The district court suppressed Orta's grand jury testimony, but this Court reversed, broadly stating, supra at 314:

"It is clear that the protection of the Fifth Amendment relates to crimes alleged to have been committed before the time when the testimony is sought. A witness, ignorant and uninformed of his constitutional rights, would not intelligently waive them if he testifies, thinking that he was compelled to do so. He might answer truthfully and thereafter assert the constitutional guaranty. Under no circumstances, however, could he commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime. As said in Glickstein v. United States 1911, 222 U.S. 139, 142, 32 S. Ct. 71, 73, 56 L.Ed. 128: ' ° ° ° the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury.'

"The only debatable question is one of the supervision of the conduct of Government representatives in the interest of fairness. In United States v. Scully, 2 Cir., 1955, 225 F.2d 113, 116, the Court of Appeals for the Second Circuit held:

' ° ° ° the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury.'

"That holding is applicable to the present record. *There is no showing that the Grand Jury before which Orta*

testified was seeking to indict him or any other person already identified." (Emphasis supplied).

Although clearly holding that a mere "witness" uninformed of his rights before the grand jury, even one concerning whom there is a "mere possibility" of indictment, may not commit perjury with impunity, the Orta court sounded the important caveat that the question of supervision of the conduct of government representatives in the interest of fairness may be debatable in some circumstances. The language in the Orta opinion, supra at 314,

> "There is no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person already identified."

highlights the important distinction between Orta and this case, demonstrating the wisdom of the caveat concerning the court's duty of supervision "in the interest of fairness." The instant case does not involve a mere "witness," but a putative, and subsequently actual, defendant. The facts showed that there was a mere possibility that a witness may later be indicted, but that the government deliberately suboenaed a putative defendant before the grand jury primarily for the purpose of obtaining incriminating or perjurous statements against him and mainly in order to elicit evidence helpful in indicting him. Several decisions of this Court, such as Orta, Daniels, Glasco, Stassi and Wilcox,[7] have involved perjurous testimony and the adequacy of the instruction as to constitutional rights; however, the precise issue of a putative defendant who was primarily called before the grand jury for the purpose of obtaining incriminating or perjurous statements and mainly in order to elicit evidence helpful in indicting him

7. United States v. Orta, 253 F.2d 312 (5th Cir. 1958; United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972); United States v. Glasco, 488 F.2d 1068 (5th Cir. 1974); Stassi v .United States, 401 F.2d 259 (5th Cir. 1968); United States v. Wilcox, 450 F.2d 1131 (5th Cir. 1971).

has not been presented to this Court. Although there are factually overlapping features of the cases to be discussed, we have concluded that the totality of circumstances in the case at bar calls clearly for this Court to affirm the district court's suppression of Mandujano's testimony before the grand jury.

[2] As heinous as the crime of perjury is under our law, and as correct as the Orta principle is, that a witness uninformed of his constitutional rights generally should not be afforded a license to commit perjury, under our law, we simply cannot ignore the unfairness in baiting this defendant before the grand jury and overlook the principle that the Fifth Amendment must always be as broad as the mischief against which it seeks to guard. In order to deter the prosecuting officers from bringing a putative or virtual defendant before the grand jury, for the purpose of obtaining incriminating or perjurous testimony, the accused must be adequately apprised of his rights, or all of his testimony, incriminating and perjurous, will be suppressed. In order to combat these methods the Fifth Amendment privilege must be fully honored in this situation. This end entails only slight erosion of the general principle announced in Orta. This deviation in the situation of a putative defendant uninformed of his Miranda rights and called for the purpose of obtaining incriminating or perjurous testimony is necessary to counteract the fundamental unfairness of allowing a defendant to be faced by such a Hobson's choice.

In distinguishing Orta, we distinguish the other cases, cited above rendered after the date of Miranda, which reaffirmed the Orta principle (pre-Miranda), as none of these decisions concerned the situation of a putative defendant entitled to, but unadvised of, his Miranda warnings. The problem here is the problem adverted to in the

dictum in Orta, and not the problem adjudicated by the Orta holding or by any other decisions of this Court. As previously indicated, the grand jury was not seeking to indict Orta and Orta was not a putative defendant entitled to Miranda warnings. Orta was an ordinanry witness entitled to a general Fifth Amendment warning.

The district court apparently determined that in view of the subsequent holding in Miranda, there was now an essential difference between a prosecution for perjury when there have been no Miranda warnings and the suppression of testimony under the exclusionary rule, when such warnings have not been given, i.e., that although the indictment could not have been dismissed, the testimony could nonetheless have been suppressed. This distinction would be a facile solution to the difficult question here, were it not for the language in United States v. Glasco, 488 F.2d 1068 (5th Cir. 1974), intervening between the district court's decision in the case at bar and the instant appeal, indicating that Orta had "post-Miranda vitality." In Glasco the defendant witness, who was in custody for another crime, had perjured himself when testifying in the trial of another defendant and the court held that a motion to suppress was properly denied. Again, however, Glasco concerned entirely different facts, and an entirely different procedure. Glasco was not put up as a witness to give evidence incriminating himself. He had already pleaded guilty to the same offense. Here, the agent reported that he believed Mandujano had committed the narcotics offense charged in count 1, and the government proceeded to subpoena Mandujano before the grand jury and asked him the precise questions dealing with a transactions that led to his being indicted by this same grand jury. Moreover, since Glasco appeared at a trial as a defense witness, he apparently appeared voluntarily and not by the compulsion of a subpeona issued on behalf of the government.

Furthermore, the two cases cited in Glasco, Wilcox and Stassi, also involved factual circumstances so dissimilar from those of the instant case that they need not be discussed. Both cases quoted from the Orta opinion.

One final case, United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972), which was noted by the district court, discusses the applicability of Orta to persons who commit perjury before a grand jury. Grand jury witness Daniels signed a "Waiver of Privilege Against Self-Incrimination" which advised that a witness could consult with an attorney outside the grand jury room but contained no statement with respect to the appointment of counsel for indigent witnesses, and proceeded to give perjurous testimony to the grand jury. Daniels conceded that generally there is no right to counsel for ordinary witnesses appearing before the grand jury but argued that when an indigent witness who is advised that he may have an attorney present, must also be advised that if he is unable to provide his own counsel, one will be appointed for him free of cost. Finding that Daniels was "only a witness" and "was not under indictment when he appeared," the court held that he was not entitled to appointed counsel. The important distinguishing factors are that Daniels did not argue that he was entitled to Miranda warnings, but only contended that since a witnesses could have retained counsel, he should have been advised that indigent witnesses may have appointed counsel free of cost. Furthermore, the court clearly delineated that Daniels was only a witness and not a putative defendant. Therefore, the latter portion of the decision which concludes that Daniels, even if entitled to counsel and deemed not to have waived his rights, would still have no license to perjury is a reaffirmation of the general principle announced in Orta and is to be distinguished completely from the situation of a putative defendant entitled to Miranda warnings who is called

before the grand jury for the purpose of obtaining incriminating or perjurous testimony.

[3] We reiterate that the Orta principle that witnesses uninformed of their constitutional rights should not be allowed a license to commit perjury continues with full force. We only make a slight inroad that where a totally unfair procedure is put in train—as when there is a factual determination that a person who is subpoenaed before the grand jury and questioned about an alleged crime, was already known to the satisfaction of the prosecuting agency prior to the grand jury appearance to be guilty of that precise crime—, elemental fairness requires that such a person is under such compulsion as to require that he be given the Miranda warnings, and that failure to do so must require suppression of any incriminating testimony given by him even though he is being prosecuted for giving false testimony.

[4] The remaining question arises from the principle that the Fifth Amendment protection against self-incrimination extends only to past acts, not to those that are or may be committed in the future. As stated in Glickstein v. United States, 222 U.S. 139, 32 S. Ct. 71, 56 L.Ed 128 (1952) [quoted by the Orta court, as stated infra], " • • • the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury." The appellant urges that when the defendant Mandujano appeared before the grand jury, he had not committed the perjury and that his criminal liability concurred with his utterance before the grand jury. Therefore, the perjury indictment was not premised upon evidence of past acts obtained from the mouth of the defendant, but was based on a crime whose very commission, rather than evidence of commission, was the defendant's testimony. Glickstein v. United

States, supra, concerned a bankrupt who was indicted for perjury for having falsely sworn in a bankruptcy proceeding while under examination before a referee.

Once again, we must point to the distinguishing characteristics in the facts and the proceedings in this case. The entire proceedings here which led up to Mandujano's indictment for perjury were, as we have noted repeatedly, beyond the pale of permissible prosecutorial conduct.[8] We conclude that the entire proceeding was a violation of Mandujano's due process rights under the Fifth Amendment.

We, of course, do not attempt an axiomatic definition of due process, but note the well known language from Betts v. Grady, 316 U.S. 455, 462, 62 S. Ct. 1252, 1256, 86 L.Ed. 1595 (1941), overruled on other grounds, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1962):

" 'Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.' "

Although the application of the standard set in Betts v. Brady, supra, was overruled in Gideon v. Wainwright, supra, it is clear that the test remains the same. Was the conduct (refusal to appoint counsel) so "offensive to the

8. As did the trial court, we refrain from placing blame on any one official for what turned out to be conduct "smacking" of entrapment. We recognize the fact that involved here were an agent who reported to his superior, and then a special attorney having designated duties in the field of narcotics investigation and prosecution, and finally the United States Attorney and his staff. Somewhere within this chain of command and information, a decision was made to subpeona as a witness a man to whom the original agent testified he had given $650 for a "score," and to ask this witness about this specific transaction.

common and fundamental ideas of fairness" as to amount to a denial of due process. 316 U.S. at 473.

We conclude simply that the proceedings here complained of met that standard.

We believe this not to be inconsistent with any prior decision of this Court, all of which dealt only with the specific rights guaranteed by the self-incrimination clause of the Fifth Amendment.

The judgment is affirmed.